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No.

UNITED STATES SUPREME COURT

In the Matter of

Justin R. Dahlz

No. 139793

A Member of the State Bar

Petition for a Writ of Certiorari to the

California Supreme Court

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QUESTIONS PRESENTED

1. Is not the addition of eight new charges at the appellate level that determines the disposition a denial of due process of law?

2. Is not the addition of eight new claims of lying, moral turpitude, and dishonesty at the appellate level without notice that determines the disposition a denial of due process of law?

3. Is not the act of moral turpitude statute, as applied to an attorney's speech in an attorney disciplinary proceeding, unconstitutional for over breadth?

4. Is not the act of moral turpitude statute, as applied to an attorney's speech in an attorney disciplinary proceeding, unconstitutional for vagueness?

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No.

UNITED STATES SUPREME COURT

In the Matter of

Justin Dahlz

No. 139783

A Member of the State Bar

Petition for a Writ of Certiorari to the

California Supreme Court

I.

Introduction

This petition presents the issue whether an attorney may be subject to a one year actual suspension from the practice of law when an appellate entity bases its taking of the license on eight unnoticed charges and whether new matters are to be treated as new charges when their determination is dispositive of the punishment to be

imposed.

May culpability be found when the appellate level changes the charges without notice or opportunity to be heard?

Are claims of lying made after the conclusion of the trial and upon which the punishment is based new charges for purposes of requiring notice before conclusion of the trial?

Is California's "act of moral turpitude" statute concerning attorney misconduct unconstitutional for over breadth when applied to the speech of an attorney?

Is California's "act of moral turpitude" statute concerning attorney misconduct unconstitutional for vagueness as applied to an attorney's testimony and speech to an investigator?

II.

Judgment Appealed

This is a Petition for a Writ of Certiorari to the California Supreme Court from its order dated February 13, 2002 summarily denying a petition for review of a published decision of the Review Department of the State Bar Court of the State Bar of California. Said order imposed a one-year actual suspension from the practice of law and four years of a stayed suspension. Said order is attached as Exhibit A.

The published opinion of the Review Department of the State Bar Court of the State Bar of California is attached as Exhibit B. Said decision finding culpability is

hereinafter referred to as "the Opinion."

III.

Jurisdiction

Jurisdiction is founded on 28 U.S.C.A. Section 1257 as a petition from a decree of a State Supreme Court where the validity of a statute is drawn in question on the ground of its being repugnant to the Constitution of the United States, or where any right...is specially set up or claimed under the Constitution ...of the United States.

Pursuant to Rule 10 of the Rules of the United States Supreme Court, subdivision (c) a state court has decided an important question of federal law in a way that conflicts with relevant decisions of this Court.

IV.

Constitutional and Statutory Provisions

Fifth Amendment: No person shall be... deprived of...liberty or property, without due process of law."
Fourteenth Amendment: No State shall... deprive any person of....liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
California Business and Professions Code section 6106: The commission of any act involving moral turpitude... ,

whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes cause for disbarment of suspension.

V.

Statement of the Case

This case presents an issue of paramount importance and repetitive violation by the State Bar of California. It regularly and persistently changes the charges on attorneys after the trial is concluded and at the appellate level and punishes attorneys for unnoticed conduct and charges. The California Supreme Court has refused for over eleven years to review any of its acts or grant review to any accused attorneys.

The State Bar of California has a claimed court. It has a hearing judge. Review of his findings and conclusions may be obtained, at the request of a party, by its three-employee review department. The California Supreme Court then automatically signs its recommendation without any review. The State Bar releases its opinions as court of law opinions to the legal newspapers without notice to any affected attorneys. These illegally published opinions destroy an attorney's reputation, business, and career even though there is no licensing court action or review.

This case involves eight unnoticed and serious charges when the actual charges were minor. These eight unnoticed charges are an attack of a vicious and mean-

spirited nature on the character of a minority member of the bar. There was no evidence to support this character assassination published by the State Bar of California in all of the legal newspapers of the State. Exhibits C-13, C-14.

The petitioner is an attorney at law for twelve years. He is a native of India. His mother tongue is the Hindi language. This case concerns the first case he handled upon his admission to practice law in 1989. Exhibit C-12-13.

A workers compensation case was transferred to him. The client had three other workers compensation cases with other lawyers. Exhibit C-17. There was a telephone conversation between the attorney and the client. The client said that, "He called me at work... He called and said, 'I'm your attorney on your workers comp case... I asked him which case. [He said] 'How many cases do you have?'... I said, "Which case are you talking about?" He refused to tell me which case he was talking about, because at the time I did have the ankle case going on, and he did not sound like the attorney who was helping me on that, and that attorney would not have called me at work." Exhibit C- 30-31.

This telephone conversation led the attorney to believe that this client did not wish to pursue this particular claim. He testified that he thought he told the claims representative for the employer that, "I'm trying to get a hold of my client. She does not seem to be interested." Asked whether he told her that his client was not interested in pursuing her case, he said, "Unilaterally, no." Exhibit C- 43. When the claims representative sent a

dismissal for the attorney to sign, the attorney did not sign it or return it. Exhibit C-44.

The attorney testified that, "... I think...[she] told me she moved from Benicia to another place." The client's employer also had a different address than the one the attorney had for the client. Exhibit C-32.

Thereafter the client terminated the attorney, represented herself and settled her own claim. The workers compensation board sent notices to the client. Exhibit B-13. The attorney received notice of a hearing date. Because the signed substitution of attorneys was not returned to the attorney, the attorney went to the hearing but arrived late. He spoke to the judge after the hearing in which the client had settled her own claim. The judge advised him that the client had settled her own claim. Exhibit C-23-24. The attorney was paid nothing. He billed nothing on the case. Exhibit C-23.

Based on a complaint, the State Bar of California requested information from the attorney. Its investigator spoke to the attorney. The attorney explained what had happened. He sent his billing records and the contents of his file. The billing records showed "Appearance before Hon. George W. Mason on 7\2\96 in Walnut Creek, CA." Exhibit C-22-23. The copy of the stipulation in the attorney's file settling the case had the attorney's signature on the line indicated for it. Exhibit C-26-27. At the trial the attorney testified that, "I did not know there was a hearing. When the trial briefs are filed, I don't think I was provided with a copy of the trial brief. (He wasn't. The judge had instructed the employer's representative to serve the client). He was asked, "Are

you telling me that you were not notified that the matter was going to hearing on July 2nd?," and he responded,, "That's true." After he was shown a notice of hearing date and acknowledged he received it, he was then asked, ".... So, your answer before was incorrect. You did receive notice of the hearing prior to the hearing?" He responded, "No. I thought the question was whether I received a copy of the trial brief, and I said no... No, I did not get a copy of the trial brief." Exhibit C-32-34.

Based on the above, the prosecutor at the trial accused the attorney of "poneying up a document;" said that the attorney was "not an artful prevaricator, your Honor, but nevertheless, he's a heck of a prevaricator," that "...I don't believe he's outside of the practice of law, an evil man...;" that the attorney is "double faking;" that the attorney "no doubt entered that to cover himself," that he is a "dangerous attorney," he "lied," he made "multiple misrepresentations to [a state bar employee], and he was "phonying up of the court document." This prosecutorial misconduct of the State Bar employee expressing her personal opinions and beliefs of the merits, the character, and the facts was not curtailed nor subject to reprimand or sanction by the State Bar judge. Exhibit C-13.

The noticed charges were, as stated by the prosecutor, a garden-variety failure to perform competently, communicate, abandonment, and failure to promptly return a file in a single client matter. Exhibit C-16. These failings in the first case handled by the attorney upon his admission to the bar which

occurred many years ago warranted a maximum forty five day actual suspension under the worst of circumstances. Normally such failings would result in a reprimand. Exhibit C-17, ft. 4.

A. The Act of Moral Turpitude Charge

The one unusual charge was an alleged act of moral turpitude charge. It was based on the attorney's speech in the one telephone conversation with the opposing party's claims representative that had occurred many years before the trial. Exhibit C-16.[1] The notice of disciplinary charges charged that the attorney "informed [the opposing party's claims representative] that his client did not want to pursue her WCAB matter."... Exhibits C-39 and D-10-11. The notice of disciplinary charges alleged that, "By advising [her] that his client did not want to pursue her WCAB matter, Respondent intentionally misrepresented the position of his client and committed an act of dishonesty. By the foregoing conduct, Respondent willfully violated Business and Professions Code section 6106." Exhibit D-9-10.

The hearing judge, without notice or hearing, changed the charge of stating that the client did not "wish to pursue the claim" to "did not intend to pursue the claim." Exhibit C-45. Then the review department changed this charge a second time without notice, to the

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[1] The solicitation and moral turpitude charges concerning the alleged solicitation set forth as counts six and seven were dismissed. Exhibit C-16, ft. 3.

attorney "misrepresented that [his client] no longer wanted to pursue her claim." Exhibit C-46. As set forth above, the attorney's testimony was that he said "I'm trying to get a hold of my client. She does not seem to be interested." Asked whether he told her that his client was not interested in pursuing her case, he said, "Unilaterally, no." Exhibit C-43.

The claims representative for the employer testified that she retired on July 19, 1996; that prior to working for Pacific Bell she was 'home playing Mama;' that she had never met nor seen the accused attorney before; that her responsibility was to settle the case; she spoke with the attorney once, by telephone; and it would have been 'early in 96, in the first couple of months.'" Exhibit C-41. She was asked, "And to the best of your memory, can you tell us what transpired in that conversation?" She answered, "Well, as you know, it's been a long time, but Mr. Dahlz indicated that his client was not going to pursue the case." She then testified that the next day she prepared a letter for the attorney seeking his signature to it confirming that his client did not wish to pursue the claim. She testified that the attorney never signed nor returned the letter. Exhibit C-41.

Based on the foregoing, the review department stated that the "attorney telephoned [the opposing party's claims representative] and unequivocally told her that [his client] did not intend to pursue her claim." Exhibit C-46. This was patently false. The transcript indicates that the claims representative never made such a claim. She said that

"it had been a long time." She answered solely based on the best of her memory that the attorney said that his client did not wish to pursue her claim. No one made a claim that anything was unequivocally said.

The review department made up the following eight unnoticed charges at the appellate level and without any warning or notice to the attorney: 1) misrepresentation to the State Bar investigator by sending the billing statement which listed appearance before the WCAB judge, 2) misrepresentation to the State Bar investigator by sending the stipulation with his signature on it when he did not sign the original, 3) misrepresentation to the State Bar investigator by stating "I have been to the hearing at the WCAB in Walnut Creek on July 2, 1996," 4) presented false testimony in the State Bar's Court by saying that he did not know if he had talked to his client and then saying that he thought his client had told him she moved, 5) presented false testimony in the State Bar's Court when he said that he had been in touch with his client by telephone, 6) presented deliberately false testimony when he testified he did not know the date of the WCAB hearing, 7) committed multiple acts of dishonesty and moral turpitude, and 8) lying to the opposing party, to the State Bar investigator, and State Bar Court." Exhibit C-21.

The review department concluded that, "He lied to the opposing party about his activity on the case and later lied again to the opposing party about his client's interest in pursuing her claim." Exhibit C-34. It found that, "We adopt the hearing judge's finding that respondent committed an act of moral turpitude in

violation of section 6106 when in March 1996 he misrepresented to [the claims representative] that [his client] no longer wanted to pursue her claim." Exhibit C-39.

The review department ambushed the attorney. It regularly does so in decisions it issues. It makes up non-existent records and non-existent new charges and finds culpability of its unnoticed new charges with no evidence. It terrorizes attorneys into admitting to guilt to make money for itself. Lawyers are aware it fabricates the records and manufactures evidence without facing any consequences for its misconduct. The State Bar makes money from finding lawyers guilty so as to pay their own salaries. There is no court review. The fabrication of non-existent records is non-reviewable.

The review department in recommending a one-year actual suspension and four years of probation over the first case the attorney handled upon his admission to the bar, published statewide its findings of culpability of eight new and unnoticed charges. It found that "We make this recommendation because of the serious moral turpitude involved in respondent's deliberately attempting to mislead the State Bar investigator, his false testimony before the hearing department of this court, and his lying to the opposing party to the potential detriment of his client." Exhibit C-36. It claimed that this case involved "lying by the respondent to the opposing party, to a State Bar investigator, [and] to the State Bar Court." Exhibit C-34. It claimed that "the magnitude of the misconduct

is substantial" and that the attorney "committed multiple acts of dishonesty and moral turpitude." Exhibit C-35.

As the above actual testimony indicates, not one of these eight unnoticed new charges had any clear and convincing evidence to support them so as to find culpability of the attorney. Exhibit C-24-25. The attorney spoke English as a second language. His difficulty with some of the more vulgar and colloquial aspects of the language was apparent. Exhibit C-28-29.

Should a lawyer be sanctioned because of invidious discrimination against him as a minority member of the Bar because he speaks with an accent and does not relate to low-level ghetto English practiced by the State Bar employees who use such terms as "poneying up, double faking, and prevaricator" and because he is a gentleman in the face of such prosecutorial and judicial misconduct?

VI.

Is Not The Addition of Eight Unnoticed Charges a Denial of Due Process of Law?

Attorney disciplinary proceedings are quasi-criminal in nature. **In re Ruffalo** (1968) 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 117. In **Ruffalo,** the attorney was charged with soliciting clients through an agent. The agent testified that he did not solicit cases but that he investigated them, including cases against his

private railroad employer. The attorney disciplinary board added a new charge after the conclusion of the trial.

The new charge alleged that the attorney conspired with his agent to prepare lawsuits against the agent's employer, "well knowing that said practice was deceptive in its nature and was morally and legally wrong as respects [the agent] toward his employer." **In re Ruffalo** at 546-547. This Court held that, "...the charge for which the petitioner stands disbarred was not in the original charges against him. It was only after he and [the agent] testified that this additional charge was added. ... no additional evidence against petitioner was taken....."

This Court held that an attorney is entitled to procedural due process, "which includes fair notice of the charge." (citation omitted)... In the present case petitioner had no fair notice that his employment of [the agent] would be considered a disbarable offense until after both he and [the agent] had testified." **In re Ruffalo** at 549.

This Court's conclusion was that "The charge must be known before the proceedings commenced.... This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." **In re Ruffalo** at 552.

The Notice of Disciplinary Charges specifically alleged only one act of moral turpitude. It alleged that the attorney committed an act of moral turpitude by stating to the opposing party's representative that his client did not want to pursue her claim. There were no

other charges concerning dishonesty, moral turpitude, lying, fraud, or any of the scathing character assassination charges of the review department. With eight unnoticed charges of dishonesty, perjury, lying, moral turpitude added after the conclusion of the trial and after briefing and argument in the review department which form the basis of the punishment, should not this Court hear and entertain this important case concerning disobedience to its orders and especially when such character assassination is done behind an attorney's back by ambushing him and then disseminating this character assassination state-wide in the legal press?

VII.

Is Not the Change in the Moral Turpitude Charge After Trial a Due Process Violation?

When the one moral turpitude charge was changed from the noticed charge of "did not want to pursue her...matter"..., Exhibits C-39 and D-10-11, to the hearing department claiming it was "did not intend to pursue the matter," to the review department claiming that "he misrepresented... that [his client] no longer wanted to pursue her claim," is not this playing fast and loose with the noticed facts and changing them on whim and caprice a denial of due process of law?

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VIII.

Is not Act of Moral Turpitude Unconstitutionally Over broad as Applied to the Attorney's Speech?

The American Bar Association deleted act of moral turpitude as a cause of attorney discipline. It stated, "[T]he Model Rules also eliminate the troublesome 'moral turpitude' standard... This standard has been broadly defined as 'an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' That the standard was manifestly ambiguous is evidenced by the wide ranging interpretations given it by the courts." A.B.A. Annotated Model Rules, Rule 8.4, Misconduct, Comment, at 353. Exhibit B (at 30).

California appears to be the only jurisdiction retaining this cause for attorney discipline. The California case law has not specifically held that the act of moral turpitude statute would be applied to speech. However, the California Supreme Court by denying review in all State Bar cases for over eleven years has delegated its judicial decision-making to the State Bar employees.

In this case the one noticed act of moral turpitude charge and the eight other unnoticed moral turpitude charges relate to this attorney's speech.

The issue was raised on reconsideration motion with the Review Department after it had issued its

opinion with its eight new moral turpitude charges relating to the attorney's speech to the opposing party, to the State Bar investigator, and at the hearing. It was also raised in the Petition to the California Supreme Court. However, the issue of the unconstitutionality due to over breadth was never addressed.

The act of moral turpitude statute reaches a substantial amount of speech. It fails to have the two requirements for a restriction on the first amendment right to freedom of speech. It has no compelling state interest. There is also no narrowly drafted statute, which targets solely the speech, which the State has a compelling state interest in chilling, quashing, censoring, condemning, or punishing. As held in **Buckley v. Valeo**, 424 U.S. 1, 60-68,96 S.Ct. 612, 654-658; 46 L.Ed. 2d 659 (1976)," any infringement on such rights must be based on a compelling governmental interest; even then, the state must demonstrate that it has chosen the least restrictive means to further such an interest." **Buckley v. Valeo**, 424 U.S. 1, 60-68, 96 S.Ct. 612, 654-658; 46 L.Ed. 2d 659 (1976)

Even one to whom the statute applies may challenge a statute for over breadth. **Broderick v. Oklahoma** 413 U.S. 601, 613, 37 L. Ed. 2d. 830, 93 S. Ct. 2908 (1973) 413 U.S. 601, 613, 37 L. Ed. 2d. 830, 93 S. Ct. 2908 (1973).

When the act of moral turpitude statute is applied to reach a substantial amount of speech as in this case, where it penalizes speech that every person

would regard as lawful, and where it punishes without a clear and present danger justifying the infringement on the first amendment right to freedom of speech, it would appear that intervention by this Court is necessary to protect attorneys being punished for their speech. This is especially true when the speech is innocuous, innocent, and solely coerced by way of a need to defend and where that speech is from a non-native born speaker and indicative of nothing more than a different but reasonable interpretation of the words that are used. **Massachusetts v. Oakes** 105 L. Ed.2d. 493 (1990).

IX.

Is not Act of Moral Turpitude Unconstitutionally Vague as Applied to This Attorney's Speech?

This Court has made clear that the term "moral turpitude" is limited to actual cases of intentional and knowing fraud. It does not include reckless statements. **Jordan v. De George** 341 U.S. 223; 71 S. Ct. 703; 95 L. Ed 886 (1951). This decision was by a 5 to 4 vote in 1951. Since the American Bar Association has declared the term "act of moral turpitude" too vague to be enforceable as a rule of professional conduct for attorneys that the reasoning of the dissent in **Jordan,** at 235 should now be applied to declare the California statute prohibiting an act of moral turpitude unconstitutional for over breadth and

vagueness. As stated by Justice Jackson in **Jordan,** at 235:

> "Congress did not see fit to state what meaning it attributes to the phrase `crime involving moral turpitude.' It is not one which has settled significance from being words of art in the profession. If we go to the dictionaries, the last resort of the baffled judge, we learn little except that the expression is redundant, for turpitude alone means moral wickedness or depravity and moral turpitude seems to mean little more than morally immoral. The Government confesses that it is `a term that is not clearly defined,' and says: `The various definitions of moral turpitude provide no exact test by which we can classify the specific offenses here involved...Black's Law Dictionary defines turpitude as: `Inherent baseness or vileness of principle or action; shameful wickedness; depravity.'..... Bouvier's Law Dictionary, Rawles Third Revision, defines `moral turpitude' as `An act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' Except for the Court's opinion, there appears to be universal recognition that we have here an undefined and undefinable standard.".

Is not the speech of the attorney that is claimed to be the multiple acts of moral turpitude and of lying and of dishonesty, to wit, listing an appearance on a billing statement when he did make an appearance;

stating that he had been to a hearing when, in fact, he did go there; signing an office copy of a stipulation even though the one in the court file does not have the attorney's signature; saying he spoke with his client when the client admits he did speak with her; stating his belief that the client had said that she had moved when her employer also had a different address for her; and stating that he did not know that a case was going to hearing as he had not received a trial brief even though he admitted he received the hearing date notice are such innocuous, innocent, trivial, such insignificant statements that no reasonable person would ever ascribe dishonesty, moral turpitude, or lying to them? Based on these statements, is the character assassination made by the State Bar statewide of this attorney, consistent with due process of law?

Is not the inherent vagueness of the act of moral turpitude statute such that these statements do not clearly fall within the language of the statute as the statute is attacking everyone's speech. **Gooding v. Wilson**, 405 U.S. 518, 520; 92 S. Ct. 1103; 31 L.Ed. 2d 408 (1972).

Conclusion

The attorney is an honorable man. He answered truthfully within the limitations of his knowledge of the language, its structure and meaning. Nothing he said could be said to be a lie or an act of moral turpitude or of dishonesty. A State Bar has labeled him statewide as a

liar and a dishonest attorney without cause.

This petition should be entertained to clarify that charges must be known before a proceeding commences. It should be entertained to decide whether new matters upon which the punishment depend and which attack the character of an attorney must be properly noticed and the attorney must be given the right to defend himself, his career, his reputation, and his license to practice law.

This petition should be entertained to protect the freedom of speech of attorneys. Even the speech of a minority member of the bar with an accent should not be punished under the rubric that such speech is an act of moral turpitude, because the speech is different, reasonable, but not the colloquial slang English of the native-born. This petition should be entertained to declare the act of moral turpitude statute used to punish attorneys' freedom of speech unconstitutional for over breadth and for vagueness as applied.

For the foregoing, petitioner attorney respectfully requests that this Petition for a Writ of Certiorari be entertained.

Respectfully Submitted,

Dated: April 9, 2002

JUSTIN DAHLZ
Petitioner Attorney ***Pro Se***

Table of Contents to Appendix

Exhibit A-California Supreme Court order, February 13, 2002

Exhibit B- Review Department Opinion, July 9, 2001

Exhibit C-Petition for Review, December 10, 2001

Exhibit D- First Amended Notice of Disciplinary Charges

SUPREME COURT
FILED
FEBRUARY 13, 2002
Frederick K. Ohlrich Clerk

Deputy

State Bar Court Case No. 96-0-03184

S101341

IN THE SUPREME COURT OF CALIFORNIA

En Banc

In re JUSTIN R. DAHLZ on Discipline

Petition for writ of review denied. It is ordered that Justin R. Dahlz, State Bar No. 139783, be suspended from the practice of law in the State of California for four years and until he has shown proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4 (c) (ii) of the Standards for Attorney Sanctions for Professional Misconduct; that execution of the four-year suspension be stayed; and that Dahlz be placed on probation for four years subject to the conditions of probation, including a

one-year period of actual suspension, recommended by the Review Department of the State Bar Court in its opinion filed on July 9, 2001. Furthermore, Dahlz is ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of this order.* Costs are awarded to the State Bar in accordance with Business and Professions Code section 6096.10 and payable in accordance with Business and Professions Code section 6140.7.

*(See Business and Professions Code s. 6126, subd. (c).)

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Chief Justice

Public Matter-Designated for Publication

FILED
JULY 10, 2001
STATE BAR COURT
CLERK'S OFFICE
LOS ANGELES

REVIEW DEPARTMENT OF

THE STATE BAR COURT

In the Matter of	)	
	)	
Justin R. Dahlz,	)	Case No. 96-0-03184
	)	
A Member of the State	)	OPINION ON
	)	REVIEW
	)	
	)	

Respondent Justin R. Dahlz [1] seeks our review of a hearing judge's decision in which the hearing judge found respondent culpable of multiple acts of misconduct in a single client matter. Of at least *equal,* if not greater concern are the hearing judge's findings of deception by respondent in

[1] Respondent was admitted to the practice of law in the State of California on June 6, 1989, and has been a member of the State Bar since that time.

dealings with (1) the opposing party in the underlying action, (2) the State Bar investigators investigating the complaint of his client and (3) the State Bar Court in the presentation of testimony and exhibits before the hearing department.

More specifically, the hearing judge found that respondent (1) violated rule 3-110(A) of the former Rules of Professional Conduct (effective May 27, 1989, to September 13, 1992) (hereafter former rule 3-110(A)) by failing to competently perform the legal services for which he was retained; (2) violated Business and Professions Code section 6068, subdivision (m)[2] by failing to respond to the client's reasonable status inquiries; (3) violated "former" rule 3-700(A)(2) and rule 3-700(A)(2) of the "current" Rules of Professional Conduct by improperly withdrawing from employment; (4) violated "former" rule 3-700(D)(1)[3] by failing to give the case file to the client; and (5) committed an act of dishonesty in violation of section 6106 by misrepresenting, to an

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[2] All further statutory references are to the Business and Professions Code unless otherwise indicated.

[3] Contrary to the State Bar's charges and the hearing judge's finding, there is no "former" rule 3-700(A)(2) or 'former" rule 3- 700(D)(1). Rules 3-700(A)(2) and 3-700(D)(1) became effective on May 27, 1989, and have not been modified or amended since that time. Accordingly, we deem the charged and found violations of "former" rules 3-700(A)(2) and 3-700(A)(1), as charged and found, violations of rules 3-700(A)(2) and 3-700(D)(1) of the Rules of Professional Conduct (effective May 27, 1989, to present).

opposing insurance adjuster, that the client no longer wanted to pursue her claim.[4] In aggravation, the hearing judge did not find "credible" respondent's testimony that his client told him she did not wish to pursue her claim. He further found that respondent offered into evidence a false telephone log entry that was prepared solely for the purposes of trial. Further, that he presented to the State Bar investigator a copy of a stipulation under which his client settled her claim and which bore his signature, when he had not participated in the settlement and was not a signatory to that stipulation, and falsely represented to the State Bar investigator that he had appeared before a Workers Compensation Appeals Board (WCAB) judge at the time of the settlement of his client's claim, when, in fact, he had not. In addition, the

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[4] On the motion of the State Bar, the hearing judge dismissed (1) the violation of rule 3-700(A)(2) of the Rules of Professional Conduct charged in count four of the first amended notice of disciplinary charges and (2) the violation of section *6152,* subdivision (a) charged in count six of the first amended notice. We adopt those dismissals, but modify them to provide that the charges are dismissed with prejudice. (Rules Proc. of State Bar, rule 26 1(a).) The hearing judge also dismissed for want of proof the violations of rule 1400(C) of the Rules of Professional Conduct charged in count six of the first amended notice. He also found the charge of violation of section 6106, as alleged in count seven, duplicative of count five because of the absence of proof in count six. He found no culpability in count seven. The State Bar does not challenge that finding or those dismissals on review, and after independently reviewing the record, we adopt them, but modify them to provide that the dismissals are with prejudice.

hearing judge found respondent "was less than forthright in his testimony..." Finally, the hearing judge found further aggravation in that respondent's misconduct harmed the client.

The hearing judge recommended that respondent "be suspended from the practice of law for three years and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct;[5] that said suspension be stayed; and that he be placed on probation for four years subject to the following conditions: 1. That during the first 150 days of said period of probation, Respondent shall be actually suspended from the practice of law...."

On review, respondent does not contest any of the hearing judge's culpability findings. Instead, he raises only the following three points of error; (1) that the evidence is insufficient to support the hearing judge's aggravation finding that his misconduct harmed the client; (2) that the hearing judge's discipline recommendation is excessive; and (3) that the hearing judge erred in including, in his discipline recommendation, a requirement that respondent establish his rehabilitation, fitness to practice, and

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[5] These standards are found in title IV of the Rules of Procedure of the State Bar. All further references to standards are to this source.

learning in the law in accordance with standard 1.4(c)(ii).

The State Bar argues that respondent's first two points of error, in which he challenges the hearing judge's finding of harm and appropriateness of the hearing judge's discipline recommendation, are without merit. Furthermore, the State Bar argues that, if anything, the hearing judge's discipline recommendation is inadequate in that the recommended period of actual suspension of "less than 6 months--is generous, perhaps even to a fault. [Fn. omitted.]"

With respect to respondent's third point of error, the State Bar suggests that the hearing judge's recommendation of a standard 1.4(c)(ii) condition is incomplete and ambiguous as written and should be modified on review to correct any such deficiency.

Of course, we independently review the record and may make findings and conclusions at variance with the hearing judge. (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); **In re Morse** (1995) 11 Cal.4th 184, 207.) While we focus primarily on respondent's points of error attacking the hearing judge's finding of harm and discipline recommendation, we must still independently review the record to determine whether all of the hearing judge's findings of fact and conclusions of law are supported by the record. *(In the Matter of Hanson* (Review Dept. 1994)2 Cal. State Bar Ct. Rptr. 703, 709; cf. **Slavkin v. State Bar** (1989) 49 Cal.3d 894, 902 [even if attorney does not contest the State Bar Court's findings of misconduct,

the Supreme Court independently reviews them because their validity bears on its ultimate choice of discipline].)

Following our independent review, we affirm the hearing judge's finding of moral turpitude (section 6106), failure to perform (former rule 3-110(A)) and improper withdrawal (rule 3-700(A)(2). We reject the hearing judge's separate finding of culpability under rule 3-700(D)(1) because we have used the misconduct alleged under that count as part of the evidence to find culpability under former rule 3-110(A). While we disagree with a portion of the hearing judge's findings in the count charging a violation of section 6068, subdivision (m), we do find culpability under that section because we find that his client Michelle Douglas sent at least one letter to respondent in which she made a reasonable request for information concerning her claim against Pacific Bell. Respondent failed to respond to that request for information. Because of respondent's serious aggravation in lying to the opposing party in the underlying action and to the State Bar investigator and the State Bar Court in the presentation of testimony and exhibits, we increase the recommended discipline to include one year actual suspension as a condition of probation.

The Charges

Before the conclusion of the culpability phase of the trial in this matter, the State Bar moved to amend the first amended notice "to conform to Proof with respect to the charged violations of the Rules of

Professional Conduct. In count one, the State Bar incorrectly amended the charges by deleting the charged violation of rule 3-110(A) of the Rules of Professional Conduct (as amended effective September 14, 1992, to present) (hereafter current rule 3- 110(A)). As noted below, respondent's misconduct under count one began in 1989 and ended in 1996; accordingly, respondent's misconduct violated both former rule 3-110(A) and current rule 3-110(A). Therefore, the State Bar should not have deleted the charged violation of current rule 3-110(A), but should have added a charged violation of former rule 3-110(A) to it.

No due process violation will occur by our holding that, under the facts alleged in count one, respondent violated both former rule 3-110(A) and current rule 3-110(A). First, the text of former rule 3-110(A) is virtually identical to that in current rule 3-110(A). Second, respondent has not argued any lack of adequate notice. (See *In the Matter of Myrdall* (Review Dept. 1995)3 Cal. State Bar Ct. Rptr. 363, 381, fn. 13.) Third, the trial was not limited to respondent's conduct during the time period in which former rule 3-110(A) was effective, but covered respondent's conduct after that time period when current rule 3-110(A) became effective.

Findings of Fact

The record established that, in the fall of 1989, attorney Richard Rodriguez- Ivanhoe referred to respondent a case in which Rodriguez-Ivanhoe represented Michelle Douglas with respect to a

workers compensation claim pending before the WCAB in Walnut Creek against Pacific Bell, Douglas's employer. Pacific Bell is a self insured workers compensation employer.

Respondent's first communication with Douglas was in a telephone conversation in the late fall of 1989. In that telephone conversation, they discussed respondent representing Douglas. In December 1989, respondent sent Douglas a substitution-of-attorney form authorizing him to replace Rodriguez-Ivanhoe as Douglas's attorney of record in the WOAB. Douglas promptly signed the form and returned it to respondent. At all relevant times, Douglas not only continuously worked for Pacific Bell, but she continuously lived at the same address and had the same home telephone number.

At trial, Douglas did not independently recall the date or time of making any one of ten alleged calls to respondent between April 1990 and August 1990. Accordingly, she was permitted to testify from a document (exhibit 4) that she claims is a log in which she recorded each of her telephone calls to respondent. According to Douglas, she prepared the "log" by recording in it each telephone call that she made to respondent at (or very near) the time she made the call. Respondent denied receiving any such calls or messages relating to such calls. Our review of Douglas's telephone "log" convinces us that there is an absence of dear and convincing evidence that such calls were made by Douglas. Accordingly, we reject the hearing judge's finding that Douglas telephoned and left messages for respondent on 10 different

occasions. Nor do we find clear and convincing evidence that any such calls were made by Douglas.

In addition, Douglas claimed that she had mailed six letters to respondent between August 1990 and February 1991 and that respondent did not reply to those letters. She testified that she hand wrote a letter to respondent in August 1990, duplicated it and sent the original to respondent, and kept the copy. Douglas claims she periodically added an additional date to the letter, duplicated it with the additional date or dates, again duplicated the letter and sent a copy to respondent, repeating that process six times between August 1990 and February 1991. The only evidence of the dates of mailing of those letters is the remaining copy of the letter containing six dates. Respondent denied receipt of any of those letters. We conclude that the evidence that Douglas sent six letters to respondent does not rise to the clear and convincing level. Accordingly, we reject the hearing judge's findings that Douglas sent respondent six letters. However, the record is clear that Douglas sent at least one letter. We further conclude that respondent did not communicate with Douglas during the period of either the alleged phone calls from Douglas or the alleged letters from Douglas.

After respondent substituted in as Douglas's attorney of record in the WCAB, he did virtually nothing on her case for almost a year. In November 1991, Fale Sala Leui, a Pacific Bell workers compensation claims manager, sent respondent a letter informing him that Pacific Bell intended to file a petition to dismiss Douglas's case for want of

prosecution unless respondent contacted her within 30 days. On November 29, 1991, respondent sent Leui a letter in which he stated that his law office had been in contact with Douglas and that Douglas had informed his office that she "fully intends to pursue" her claim against Pacific Bell. Respondent further stated, in this letter to Leui, that his office was in the process of accumulating the data needed to process Douglas's claim and that he would get back to Leui "within the next couple of weeks." We find that in fact respondent had not been in touch with Douglas, and respondent admits that he never got back to Leui.

Respondent testified that, after he or someone in his office contacted Douglas in November 1991 regarding Leuis letter, he was unable to locate Douglas because she had moved. But the hearing judge rejected respondent's testimony and so do we. Douglas credibly testified that she did not hear from nor was she able to contact respondent, after her telephone conversation with him in late fall of 1989 until March 1996, when she spoke with him again in a second telephone conversation. Moreover, as noted above, Douglas did not move or change her telephone number throughout the relevant time period. Further, respondent testified that he didn't remember talking to Douglas between the time she signed the substitution of attorneys and 1996.

In September 1993, Elaine Wazz, another Pacific Bell workers compensation claims manager, sent respondent a letter in which she noted that respondent had done nothing on Douglas's claim for over a year and that Pacific Bell intended to file a

petition to dismiss Douglas's case for want of prosecution unless respondent contacted her within 30 days. Respondent admits that he did not respond to Wazzs letter.

In October 1995, Pacific Bell filed its answer in Douglas's case and served a copy of it on respondent. Then, in February 1996, Rita McPeake, a Pacific Bell workers compensation hearing representative, sent respondent a letter informing him that a status conference was set in Douglas's case for March 28, 1996. Respondent received McPeakes letter on February 6, 1996. In March 1996, respondent telephoned and spoke with Douglas at her place of employment without any apparent difficulty in locating her. During that telephone conversation, respondent told Douglas something to the effect that "I dont want to be bothered with this" (i.e., Douglas's case). [6]

Thereafter, on March 15, 1996, respondent telephoned McPeake and unequivocally told her that Douglas did not intend to pursue her claim against Pacific Bell and that he would not be attending the March 1996 status conference in Douglas's case. McPeake told respondent she would send a confirming letter for his signature. Accordingly, McPeake prepared a "confirmation" letter, which she

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[6] In a subsequent letter Douglas referred to that conversation as occurring on March 7, 1996, while respondent offered a purported log of telephone calls making reference to a March 13, 1996, telephone call with Douglas.

faxed and mailed to respondent for his signature. Respondent did not sign and return or otherwise respond to McPeakęs confirmation letter. Nor did he attend the March 1996 status conference even though he had actual knowledge of that conference.

Respondent does not completely deny telling McPeake that Douglas did not intend to pursue her claim against Pacific Bell, but asserts that he would have "couched" his language and told McPeake something to the effect that "Im trying to get a hold of my client. She does not seem to be interested" or that "I think my client does not want to pursue this claim." The hearing judge did not find respondents testimony credible. Nor do we.

The hearing judge found that respondent fabricated an entry into his telephone log in Douglas's case file for purposes of defending the charges against him in this proceeding and "not as a record of any conversation that took place with Douglas." That entry is dated March 13, 1996, and contains purported notes from a telephone conversation that respondent allegedly had with Douglas on March 13. The entry includes a statement to the effect that Douglas is "basically not interested in pursuing this matter." While that entry may have been made at or about the time of that telephone conversation, we conclude that Douglas said nothing to the effect that she did not want to pursue her claim. We find, by clear and convincing evidence, that the log entry does not accurately reflect the conversation between respondent and Douglas and that it was

offered into evidence by respondent with knowledge of that fact.

Because respondent did not attend the March 1996 status conference, the WCAB judge directed McPeake to serve on respondent copies of the minute order from the status conference and the notice of hearing. McPeake sent respondent copies of those documents, and respondent received them. The notice of hearing dearly notified respondent that the trial in Douglaşs case was set for July 2, 1996, at 1:30 p.m. at the WCABs Walnut Creek venue. Moreover, the minute order clearly directed that the "parties *shall* submit briefs 30 days before trial." Because respondent failed to attend the March 1996 status conference, the judge also directed McPeake to begin serving Douglas with copies of Pacific Bells pleadings as though Douglas were representing herself pro se.

On April 15, 1996, Douglas sent respondent a letter by certified mail. In that letter Douglas referenced the statement that respondent made to her in their March 7, 1996 telephone conversation to the effect that he did not want to be "bothered" with Douglaşs case. She then stated that respondent needed to file the necessary papers with the WCAB to remove himself from her case and to send her file to her. Respondent received Douglaşs letter on April 16, 1996.

Respondent testified that, on April 22, 1996, he sent Douglas a letter acknowledging her April 15, 1996 letter, asking her to please come into his office and pick up her file, and advising her to hire another

attorney. His file, introduced into evidence, contains a copy of that purported letter. Douglas testified that she did not receive this letter or any further communications from respondent. We find no clear and convincing evidence that respondent's testimony in this regard is false. Respondent made no further attempts to communicate with Douglas, to withdraw as her attorney of record in WCAB, or to give Douglas her case file.

Even though he clearly knew that he remained Douglas's attorney of record, respondent did not prepare for trial, did not meet with Douglas in preparation for trial, and did not submit a brief any time before the July 2, 1996 trial, as ordered by the WCAB judge.

At this late date, Douglas could not find another attorney to take over her case, although there is no evidence she attempted to do so. Accordingly, she obtained copies of her medical reports, prepared her own trial brief, and attended the trial by herself. On the day the WCAB case was tried, the parties entered into stipulations with an agreed amount requested for an award (hereafter the stipulation). Douglas and McPeake were the only persons who signed the stipulation before it was filed with the WOAB. However, because respondent remained Douglass attorney of record, there was a designated space on the stipulation for his signature. The WCAB judge entered an award in favor of Douglas in accordance with the terms of the stipulation. In the award, the judge entered "-0-" in the blank for sum

"payable to applicant's attorney as to the reasonable value of services rendered.

Respondent admits that he did not attend the July 2, 1996 trial, but testified that he did not make it because he got lost on his way to court. Respondent testified that, when he finally arrived, he spoke with the WCAB judge and that the judge told him that Douglas's case had been settled. In accordance with respondents testimony, the hearing judge found that "[r]espondent did not appear for the trial but did arrive after the proceedings were concluded." However, the hearing judge rejected respondent's testimony that (1) he went to the hearing to protect Douglas's interests, (2) he did not know whether he was still Douglas's attorney of record, and (3) he did not remember what time it was when he finally arrived at the WCAB and spoke to the judge. We agree with and adopt these three enumerated findings.

Conclusions of Law

COUNT ONE, RULE 3-110(A) (FAILURE TO PERFORM)

We agree with the hearing judge's conclusion that, at a minimum, respondent violated rule 3-110(A) (both former and current versions) by repeatedly and recklessly failing to perform the legal services for which Douglas retained him. Contrary to respondent's contentions, he did not perform any substantive work on Douglas's case for the more than

five years that he represented her. Such a complete failure to act is clearly repeated and reckless. Moreover, respondent's unjustified failure to attend the March 1996 status conference was reckless.

COUNT TWO, SECTION 6068, SUBDIVISION (m) (FAILURE TO RESPOND TO STATUS INQUIRIES)

Although we have reversed most of the hearing judge's findings concerning Douglas's purported attempts to communicate with respondent between April 1990 and February 1991, we do find that she made at least one effort to obtain information by writing respondent a letter. We determine that letter was a reasonable request by Douglas for information concerning her WCAB matter. Respondent failed to respond to that request. We find him culpable of a violation of section 6068, subdivision (m).[7]

COUNTS THREE AND FOUR, RULE 3-700(D) (1) (FAILURE TO RELEASE CLIENT FILE) AND RULE 3-700 (A) (2) (IMPROPER WITHDRAWAL)

We combine counts three and four in our analysis because of the possibility that identical conduct may be the basis for charges under each of

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[7] Respondent was not charged with failing to adequately communicate with Douglas; only with failing to respond to Douglas's status inquiries.

the charged rules, and initially address rule 3-700(A)(2) (count four) because it is the more comprehensive. Rule 3-700(A)(2) provides that an attorney "shall not withdraw from employment until [he] has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D)(1), and complying with applicable laws and rules." Accordingly, under the express terms of rule 3-700(A)(2), an attorneys failure to give the file to his client in accordance with rule 3-700(D)(1) after the attorney has withdrawn from employment may be at least a portion of conduct properly disciplinable as a violation of rule 3-700(A)(2). Such is the case before us, and we decline to again use that conduct in finding a separate violation of rule 3-700(D)(1).

The record is clear that Douglas terminated respondent's employment in her April 15, 1996 letter to him. This did not terminate respondent's responsibilities to Douglas. He remained attorney of record for her until either a proper substitution of attorney was filed with the WCAB or a motion relieving him as attorney of record was granted. He took no action to terminate his position as attorney of record, leaving his client without representation or her file, and the WCAB as well as the opposing party in a dilemma as to how to proceed. Further, respondent had a continuing obligation to comply with rule 3-700(A)(2), or its predecessor, former rule 2-111(A)(2), which prohibits an attorney from

withdrawing services until he or she has taken reasonable steps to avoid any foreseeable prejudice to the client, and which also applies when the client fires the attorney. *(In the Matter of Myrdall, supra,* 1 Cal. State Bar Ct. Rptr. at 374.) That same rule, and its predecessor, requires that the attorney continue representing the client until he or she has taken steps to avoid foreseeable prejudice." *(In the Matter of Taylor* (Review Dept.1991) 1 Cal. State Bar Ct. Rptr. 563, 574.) An attorney of record in a case remains the client's counsel and continues to have a duty to avoid foreseeable prejudice to the client's interests until a substitution of counsel is filed or the court grants the attorney leave to withdraw. *(In the Matter of Riley* (Review Dept.1994) 3 Cal. State Bar Ct. Rptr. 91, 115; rule 3-700(A)(1).)

At an absolute minimum, to effect a proper withdrawal from representation, respondent was obligated to advise his client of the dates of upcoming events, including trial dates, advise her of filing dates for various required documents, including a trial brief, and ensure that she had the ability to retrieve her file. Respondent met none of these minimal requirements. The fact that Douglas, without his knowledge, learned of these requirements elsewhere did not relieve him of these obligations. Respondent claimed he wrote to Douglas, telling her to pick up her file. In that alleged letter he expressed his doubt about whether Douglas would even receive that letter. In summary, respondent made no effort to protect the interests of his client on his de facto withdrawal from representation of Douglas.

Respondent willfully violated rule 3-700(A)(2) because he failed to properly remove himself as Douglas s [sic] failed to advise her of the trial date in her case, and because he failed to advise her that she was required to file a trial brief no later than 30 days before July 2, 1996.

Because we have used the failure of respondent to take reasonable steps to see that Douglas had the ability to receive her file as part of the basis for finding respondent culpable of violating rule 3-700(A)(2) we reject a separate finding of culpability under rule 3-700(D)(1).

The hearing judge determined that respondent was culpable of abandonment. We note that no such charge was made against respondent and reject that finding.

COUNT FIVE, SECTION 6106 (MORAL TURPITUDE)

We adopt the hearing judge's finding that respondent committed an act of dishonesty in violation of section 6106 when in March 1996 he misrepresented to McPeake that Douglas no longer wanted to pursue her claim against Pacific Bell.

Aggravating Circumstances

It is clear that aggravating circumstances must be shown by clear and convincing evidence to have an effect on discipline. (Standard 1 .2(b) *In the Matter of Cacioppo* (Review Dept.1992) 2 Cal. State

Bar Ct. Rptr. 128, 148.) Each of the indicated areas of aggravation have been found to be true by such clear and convincing evidence.

PRIOR RECORD OF DISCIPLINE

Under standard 1.2(b)(i) a prior record of discipline is an aggravating factor in measuring discipline. In accordance with a stipulation as to facts and discipline between respondent and the State Bar, that was approved by a State Bar Court hearing judge, the Supreme Court filed an order in June 1996 in which it placed respondent on 12 months stayed suspension and two years probation with conditions (but no actual suspension). The Supreme Court also ordered respondent to take and pass the Multistate Professional Responsibility Examination.

Respondent's prior misconduct involved the mishandling of trust funds in two client matters. More specifically, the balance in respondent's client trust account repeatedly dropped far below the amounts he was to have maintained on deposit. Undeniably, respondent's prior misconduct is serious.

The hearing judge gave respondent's prior record of discipline "little weight in aggravation because he found that respondent's prior misconduct "took place in 1990 and 1992 after Respondent had entered into the Douglas case." While we disagree, in part, with that finding we do not totally reject the hearing judge's analysis. Contrary to the hearing judge's finding, respondent's misconduct in the prior proceeding took place from 1992 through 1995.

Although the Supreme Court did not file its disciplinary order in respondent's prior case until June 1996, the State Bar filed, and served on respondent, the first notice to show cause in respondent's prior case in the fall of 1994. Respondent signed the stipulation as to facts and disposition in which he admitted committing the misconduct stated above in January 1996. Respondent's misconduct in the present proceeding commenced well before the State Bar had begun disciplinary proceedings in the prior matter in the fall of 1994, but continued and accelerated during the pendency of that prior proceeding and after he had stipulated, in January 1996, to engaging in serious prior misconduct from 1992 through 1995. In fact, the more egregious portion of respondent's misconduct in the present matter occurred after his stipulation to culpability in the prior matter.

Although respondent's present misconduct does not resemble that addressed in the prior disciplinary proceeding it did occur after issuance of a notice to show cause in the prior proceeding. We do accord some aggravating weight to that prior discipline. (Cf. *In the Matter of Kaplan* (Review Dept. 1996)3 Cal. State Bar Ct. Rptr. 547, 564.) His failure to conform his conduct to the standards of the attorney of record in the WCAB, because he failed to give the case file to Douglas in accordance with the request she made in her April 15, 1996 letter, because he legal profession after the institution and prosecution of that prior disciplinary case is a factor in aggravation. *(In the Matter of Hunter* (Review

Dept. 1994) 3 Cal. State Bar Ct. Rptr. 63, 80.) We give respondents prior record of discipline some greater weight than did the hearing judge.

LACK OF CANDOR

Standard 1.2(b)(vi) determines that a lack of candor is an aggravating factor. The hearing judge found that respondent displayed a lack of candor because respondent was "less than forthright in his testimony and deceptive in his dealing with the State Bar investigators." The hearing judge gave this factor considerable weight. Like the hearing judge, we find that respondent deliberately made misrepresentations to the State Bar investigator and that he deliberately presented false testimony in the State Bar Court. Like the hearing judge, we consider respondent's lack of candor to be a strong aggravating circumstance. In fact, respondent's lack of candor is more egregious than the misconduct found against him in this proceeding. The Supreme Court has repeatedly noted "that deception of the State Bar may constitute an even *more serious offense* than the conduct being investigated." (**Franklin v. State Bar** (1986) 41 Cal.3d 700, 712 (dis. opn. of Lucas, J.).)

There is a dear distinction between credibility and candor. (See, e.g., **Franklin v. State Bar, supra**, 41 Cal.3d at p. 708 & fh. 4.) The determination of a witness's credibility (i.e., believability) is primarily within the province of the hearing judge because he or she saw and heard the witness testify. (Rules Proc. State Bar, rule 305(a).) On the other hand, the

determination that a witness's testimony lacks candor (i.e., the witness is lying) must ordinarily be found by clear and convincing evidence. (Stds.1.2(b), 1.2(b)(vi) but see **Siegel v. Committee of Bar Examiners** (1973) 10 Cal.3d 156, 178-179 [in cases involving an applicant's exercise of a First Amendment right of free speech, the committee must prove the applicant to be lying beyond a reasonable doubt]). Even though a witness's candor must ordinarily be shown by dear and convincing evidence, great weight is still given to the hearing judge's findings on candor. *(***Franklin v. State Bar, supra,** 41 Cal.3d at p. 708.)

Misrepresentations to State Bar Investigator

After Douglas complained about respondent's conduct to the State Bar, a State Bar investigator sent respondent a letter asking him for an explanation. On October 8, 1996, respondent sent the investigator a letter in which he induded the following statement in his list of services that he allegedly performed for Douglas: "Appearance before Hon. George W. Mason on 7/2/96 in Walnut Creek, CA." Furthermore, respondent stated in his letter "[p]lease be aware that complainant's [i.e., Douglas's] case ... was settled through a Stipulation which resulted in an award of $1,785.00 to claimant and payment of future medical expenses (see Exhibit "D") on July 2, 1996." The "Exhibit 'D" 'respondent included in that letter was a copy of the stipulation that contained a signature by respondent in the space provided for his

signature. Respondent, however, never signed the original stipulation. As noted above, the original stipulation was signed only by McPeake and Douglas and then filed with WCAB. The original stipulation that is in the WCABs official file is not signed by respondent.

On November 25, 1996, respondent sent another letter to the investigator. In that letter respondent made the following statement: "As you have been made aware, I have been to the hearing at WCAB in Walnut Creek on July 2, 1996."

When respondent wrote his letters of October 8, 1996, and November 25, 1996, he knew that he had not made an "appearance before Judge Mason and that he had not "been to the hearing ... on July 2, 1996." The evidence dearly establishes that respondent made these statements knowing that they were false and misleading and made them with the intent to deceive the investigator.

Moreover, when he sent the investigator a copy of the stipulation with his signature on it, respondent knew that he had never signed the original stipulation that is on file at the WCAB. Respondent's signing of the stipulation is inconsistent with his claim that he did not know whether he still represented Douglas after March or April 1996. The evidence clearly establishes that respondent sent the investigator the copy of the stipulation with the intent to deceive the investigator into believing that respondent had actually appeared at the July 2, 1996 trial and represented Douglas in settling her claims.

False Testimony in the State Bar Court

As did the hearing judge, we find respondent's testimony in the hearing department to be false in several respects. Respondent initially testified that he did not know if he talked to, or had any communication with, Douglas between the time of her signing the substitution of attorney in late 1989 and the middle of 1996.[8] Dealing with that same period of time, respondent later testified "But [Douglas] told me, I think, that she moved from Benicia to another place, Richmond, I thought it was.... And that's how I got to know her new address. I think she gave it to me by telephone or something like that." In fact Douglas had the same address in Richmond throughout respondent's representation of her, had not moved during that period, and respondent had not talked with her.

As we have indicated, respondent wrote a representative of Pacific Bell in November 1991 indicating that he had been in contact with Douglas. In fact he had not been in contact with her. When questioned in the hearing department about the truthfulness of this statement in his letter, he testified "I was in contact with her by telephone, I think, not by the letter.... I think I called her, and at that time she told me go ahead and pursue the claim." This

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[8] He testified, "I don't remember that I talked to her. I don't remember."

testimony was not true and respondent knew it was not true.

Respondent testified that he did not know the hearing date of the WCAB hearing for Douglas. When confronted with the notice of the hearing from his own file containing the exact date and time of that hearing with his handwritten notes on that notice, he testified that he thought the question had to do with the filing of a trial brief in the WCAB matter. The question was clear and unambiguous. We find that respondent's testimony in this regard was deliberately false.

MULTIPLE ACTS OF MISCONDUCT

Standard 1.2(b)(ii) urges that multiple acts of misconduct be treated as aggravation. We agree, but do note that it occurred in a single client matter. However, we do note that respondents found lying to the Pacific Bell representative that Douglas did not wish to pursue her claim is similar to the found aggravation under the subheading Lack of Candor, *supra.* We include this factor in the weighing of aggravation.

HARM

Under standard 1.2(b)(iv) significant harm caused by a respondent's misconduct is an aggravating factor in recommending discipline for an errant attorney. The hearing judge found that respondent's misconduct significantly harmed

Douglas. In his first point of error, respondent contends that this finding is erroneous or, alternatively, that the hearing judge improperly gave it too much weight in aggravation. We disagree.

Ordinarily, a short delay, even if it is "harmful to a client, is not unusual, and does not, standing alone, warrant the conclusion that the client was 'significantly harmed thereby." *(***Young v. State Bar** (1990) 50 Cal.3d 1204, 1217.) However, in the present case, we are not dealing with a short delay. We are dealing with a delay of more than five years.

In addition, we have held that an attorney's failure to perform for more than five years caused the client harm under standard 1.2(b)(iv) because the client lost her cause of action. *(In the Matter of Bach* (Review Dept.1991) 1 Cal. State Bar Ct. Rptr. 631, 642, 646.) We recognized such harm even though the clients claim was weak and she could not have reasonably expected to receive a substantial settlement or judgment. *(Id.* at p. 646.) While Douglas did not lose her cause of action it is clear that the inexcusable delay in the resolution of her claim did have a substantial impact on her. A reasonable economic measure of the harm caused to Douglas is her lost use of the value of her settlement proceedings for five years. We are not dealing with a short delay, but one of an extended duration. We decline to attempt to define the extent of the economic harm to Douglas, but note that it meets the requirement of significant harm as set forth in standard 1.2(b)(iv).

Mitigating Circumstances

The hearing judge gave respondent mitigating credit for his pro bono and community service. (Std.1.2(e)(vi).) Our review of the record discloses that respondent's pro bono and community involvement was not great and is somewhat remote in time. Accordingly, we give him slight mitigating credit for that pro bono service.

Level of Recommended Discipline

In his second point of error, respondent contends that the hearing judge's discipline recommendation is excessive. In contrast, the State Bar argues that if anything, the recommended discipline errs on the side of too little actual suspension.

In determining the appropriate level of discipline, we first look to the standards for guidance. (**Drociak v. State Bar** (1991)52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept.1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) Standard 1.3 provides that the primary purposes of discipline are to protect the public, the courts, and the legal profession; to maintain the highest possible professional standards for attorneys; and to preserve public confidence in the legal profession. (See also **Chadwick v. State Bar** (1989) 49 Cal.3d 103, 111.)

The applicable sanction in this proceeding is found in standard 2 .3, which provides that an attorney's culpability of an act of moral turpitude

shall result in actual suspension or disbarment depending upon the extent of harm, the magnitude of the act, and the degree to which it relates to the attorney's practice of law. In the present proceeding, the magnitude of the misconduct is substantial and it directly relates to and involves respondent's practice of law. Respondent committed multiple acts of dishonesty and moral turpitude. Thus, significant discipline is warranted under standard 2.3.

Both the State Bar and respondent cite cases for our consideration in determining the appropriate level of recommended discipline. However, recommended discipline does not arise from a fixed formula, but should be based on a fair balance of all relevant factors, including mitigation and aggravation. (**Sands v. State Bar** (1989) 49 Cal.3d 919, 931.) Though we look to the standards for guidance, "[i]n determining discipline, the particular facts of each case must be reviewed.... 'There are no fixed standards as to; the appropriate penalty. [Citations omitted.]" (**Franklin v. State Bar, supra**, 41 Cal.3d 700, 710.). None the less, we look to like cases for guidance in an effort to provide an even hand in our recommendations. (See **Snyder v. State Bar** (1990) 49 Cal.3d 1302, 1310-1311; *In the Matter of Taylor, supra,* 1 Cal. State Bar Ct. Rptr. at p. 580.)

In support of his position that the hearing judge's recommendation of 150 days of actual suspension is excessive, respondent primarily relies on four cases; **Wren v. State Bar** (1983) 34 Cal.3d 81; **Calvert v. State Bar** (1991) 54 Cal.3d 765; **Colangelo v. State Bar** (1991)53 Cal.3d 1255; and

In the Matter of Johnston (Review Dept.1997) 3 Cal. State Bar Ct. Rptr. 585. In **Wren** the attorney, in a single client matter, failed to communicate, misrepresented the status of the matter by, inter alia, giving the client a trial date when the action had not been filed. *(***Wren v. State Bar, supra**, at pp. 86-89.) Wren was suspended for 45 days. *(Id.* at p. 83.) In **Calvert** the attorney was found culpable of a failure to communicate with her client and continuing representation when she did not have time to represent the client with competence, and not culpable of abandonment. *(***Calvert v. State Bar, supra,** at pp. 782-783.) Although there was a conflict in the evidence between Calvert and her client, *(id.* at p. 771) there was no finding of lying by Calvert. She was suspended for 60 days. *(Id.* at pp. 785-786.)

In **Colangelo**, a default in the State Bar Court proceedings although the respondent appeared before the Supreme Court, Colangelo was found culpable of, inter alia, failure to perform, failure to respond to status inquiries and failure to keep his client reasonably informed of the status of his matter. *(***Colangelo v. State Bar, supra,** 53 Cal.3d at pp. 1266-1267.) Taking particular note of the apparent lack of harm and the weakness of the evidence in the default matter *(Ibid.),* the Supreme Court imposed no actual suspension *(id.* at pp. 1258, 1267-1268.). But the dissent urged 60 days actual suspension. *(Id.* at p. 1270, dis. opn. of Baxter, J.) In *Johnston,* also a default, the final case cited by respondent concerning the length of actual suspension, the attorney was found culpable in a single client matter of a failure to

perform, failure to communicate with his client and holding himself out to his client as entitled to practice law when he was not, in fact, entitled to practice and failure to cooperated with a State Bar investigation. *(In the Matter of Johnston, supra,* 3 Cal. State Bar Ct. Rptr. at p. 589.) We recommended an actual suspension of 60 days *(id.* at p. 591) which was approved by the Supreme Court.

Each of the cases relied on by respondent has underlying misconduct similar to the found misconduct on the charges brought in the present action. But, none of those cases involved lying by the respondent to the opposing party, to a State Bar investigator or to the State Bar Court. As the Supreme Court has noted an attorney's dishonesty" 'violates "the fundamental rules of ethics--that of common honesty without which the profession is worse than valueless in the place it holds in the administration of justice." [Citations], (**Rhodes v. State Bar** (1989) 49 Cal.3d 50, 60.) The Supreme Court has regularly and consistently condemned attorney dishonesty. *(***Sevin v. State Bar** (1973) 8 Cal.3d 641, 645-646 [misappropriation and fabricated loan agreement]; **Chang v. State Bar** (1989) 49 Cal.3d 114, 128 [misappropriation with fraudulent and contrived misrepresentations to State Bar]; **Marquette v. State Bar** (1988) 44 Cal.3d 253, 263 [insufficiently funded checks].)

On the other hand, each of the cases relied on by the State Bar involves far more egregious underlying misconduct. However, several of those cases involve misrepresentations to either the

investigator for the State Bar or this court. In **Borre v. State Bar**, 1991, 52 Cal.3d 1047, the client Lascano was incarcerated in state prison on a felony conviction and was represented by court-appointed counsel. Lascanos girlfriend and her mother paid Borre the fee for an appeal. Upon notification of his representation of Lascano the court terminated the court-appointed counsel. Borre failed to file a brief following several extensions, and because of that failure the court dismissed the appeal on December 26, 1985. Borre wrote his client on February 11, 1986, and stated he had "abandoned" the appeal. *(id.* at pp. 1049-1050.) In defense Borre presented a copy of a purported letter to Lascanos mother dated one month before the dismissal stating that he found no issues for appeal but he had obtained an extension to December 18, 1985, if she wanted to find another lawyer. *(Id.* at p. 1050.) The letter was found to be false. *(Id.* at p. 1052.) The Supreme Court took note of the fact that Borre abandoned an incarcerated client, and stated that "[p]etitioners abandonment of his incarcerated client was itself a serious matter warranting substantial discipline." *(Id.* at p. 1053.) We consider Borres underlying misconduct more serious than that of respondent. (See *In the Matter of Nees* (Review Dept. 1996)3 Cal. State Bar Ct. Rptr. 459, 465, 466 [abandoned incarcerated client, six months actual suspension];) However, Borres false letter demonstrates similar conduct to that of respondent in the matter before us. In both **Worth v. State Bar** (1978) 22 Cal.3d 707 and **Warner v. State Bar** (1983) 34 Cal .3d 36 the Supreme Court

disbarred the attorneys after finding serious misconduct followed by false evidence and testimony before the State Bar.

Worth was on probation for mishandling client funds (**Worth v. State Bar, supra,** at p. 708) and was found culpable of misappropriation in the instant case along with offering a false letter, lying about it and lying about going to Missouri to obtain his clients signature on an undated disbursal letter (*Id.* at pp. 708, 710-711). Warner had two separate proceedings consolidated by the Supreme Court. The first involved unconscionable fees and unilaterally withholding interest on a loan from a client with prior similar misconduct and giving false testimony, (**Warner v. State Bar, supra**, at pp. 40-44) while the second involved misappropriation involving moral turpitude and making false representations involving moral turpitude to the disciplinary panel (*id.* at pp. *44-48).*

In *In the Matter of Johnson* (Review Dept.2000) 4 Cal. State Bar Ct. Rptr. 179, the respondent was found culpable of moral turpitude in signing a client's name to a declaration under penalty of perjury, failure to provide competent service in four client matters, failure to return unearned fees in two client matters, failure to respond to status inquiries, failure to provide an accounting, misrepresenting to a client the status of his case, breaching client confidentiality and failure to comply with the conditions of a prior reproval. (*Id.* at pp. *183-190.)* In aggravation, among other things, Johnson presented to the State Bar Court false

verification forms purportedly signed by a client. *(Id.* at p. 191.) We recommended that Johnson be actually suspended for a period of two years. *(Id.* at p. 193.)

In **Olguin v. State Bar** (1980) 28 Cal.3d 195 the Supreme Court increased the recommended actual suspension from 90 days to six months following Olguins stipulation that he failed to use reasonable diligence in prosecuting a client matter resulting in the action being dismissed and that he lied to a State Bar investigator about that client matter and fabricated documents for his defense. *(Id.* at pp. 197-200.)

With the exception of **Olguin** we determine that the underlying misconduct in each of these cases was more serious than that in the matter before us. In **Borre** the respondent "'recklessly represented to the Court of Appeal that he was Lascanos appellate attorney when he knew or should have known that he could not reasonably perform the duties of an appellate attorney ...'." *(***Borre v. State Bar, supra**, 52 Cal.3d at p. 1051.) In *Johnson* the respondent was found culpable in four client matters and a failure to comply with conditions of a prior reproval. The two misappropriation cases **(Worth** and **Warner)** were far more egregious than the matter before us.

We find no case that directly guides us, but take assistance from each of the cited cases and look to the essential facts of the matter before us. Respondent undertook representation of a client and for a period in excess of five years failed to perform any substantial service for that client. He lied to the opposing party about his activity on the case and later

lied again to the opposing party about his client's interest in pursuing her claim, to the potential detriment of the client, for which he has been found culpable of moral turpitude. He failed to respond to the client's reasonable inquiry as to the status of her matter and then improperly withdrew from representation. In substantial aggravation he attempted to mislead the State Bar investigator in at least two instances and was found to lack candor in his testimony before the hearing department. While at the time of his present misconduct, respondent did not have a true record of discipline, he had acknowledged, by stipulation, prior unrelated misconduct at the time a portion of his present misconduct was ongoing. We also note Douglas was harmed by the unconscionable delay resulting from respondent's inaction for in excess of five years.

We conclude that the interests of the public, the courts, and the legal profession will be protected only by increasing the discipline that would otherwise be imposed for the underlying misconduct to a period of actual suspension of one year, as one of the conditions of a four-year stayed suspension. We make this recommendation because of the serious moral turpitude involved in respondent's deliberately attempting to mislead the State Bar investigator, his false testimony before the hearing department of this court, and his lying to the opposing party to the potential detriment of his client.

The last issue respondent raises is the hearing judge's recommendation that respondent "be suspended from the practice of law for three years

and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), ... that said suspension be stayed; and that he be placed on probation for four years subject to the following conditions: ..." We read that recommendation to provide that the standard 1.4(c)(ii) provision be stayed along with the stayed three-year suspension, provided, that in the event of a subsequent probation revocation proceeding in which all, or a part, of the period of stayed suspension may be imposed a standard 1.4(c)(ii) would be an available condition.

Finally, we do not recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination because, as noted above, the Supreme Court ordered respondent to take and pass that examination in his prior disciplinary proceeding and because none of respondent's misconduct in this proceeding was committed after that order.

Recommended Discipline

We recommend that respondent Justin R. Dahlz be suspended from the practice of law for a period of four years and until he provides proof satisfactory to the State Bar Court of his rehabilitation, fitness to practice and present learning and ability in the general law pursuant to standard 1.4(c)(ii), that the suspension and the standard 1.4(c)(ii) provision be stayed, and that he be placed

on probation for a period of four years on the conditions that he be actually suspended for one year and that he comply with each of the remaining conditions of probation recommended by the hearing judge. Rule 955

It is recommended that respondent be ordered to comply with the provisions of rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Costs

It is recommended that costs be awarded to the State Bar pursuant to Business and Professions Code section 6086.10 and that those costs be payable in accordance with Business and Professions Code section 6140.7.

I concur WATAI, J.

Concurring and Dissenting Opinion of

STOVITZ, J.

I agree fully with the majority's findings and conclusions of respondent's culpability and analysis of the mitigating and aggravating circumstances. I also join the majority's analysis of the cases cited by respondent, agreeing that those cases do not justify

the lesser discipline respondent urges. However, even greater discipline than recommended by the majority is warranted for respondent's repeated and reckless failure to perform services for Ms. Douglas over a six-year period, his attempted sabotage of Douglas's WCAB claim, and his eight instances of deceit over more than an eight-year period collectively to the opposing party, to the State Bar investigators, and during his testimony in the State Bar Court. Noting also the weight we properly give to respondent's prior discipline, the public and the courts are entitled to the minimal protection of respondent successfully completing a rehabilitation showing under standard 1.4(c)(ii), incident to a two-year actual suspension from practice.

The majority's opinion documents well respondent's protracted failure to perform any significant services in what appears to be a routine workers compensation claim. It also shows that respondent lied twice to agents of Pacific Bell, the workers compensation employer in Douglas's case. He first misled Pacific Bell in November 1991, stating that he had been in contact with Douglas when he had not, in an apparent effort to forestall Pacific Bell's motion to dismiss Douglas's claim. His second lie, in March 1996, that Douglas did not intend to pursue her claim, had the clear effect of attempting to sabotage his own client's case. That it did not succeed is more fortuity than anything for which respondent can claim credit. Finally, at the proverbial "eleventh hour," Douglas was left to her

own efforts to see her claim through to some recovery, six years after it was filed.

As the majority finds, after the State Bar started an investigation, respondent repeatedly deceived the State Bar and this court in defending his conduct. His deceit took varied forms over four years: written misrepresentations to State Bar investigators and false testimony in three respects before the State Bar Court which, in part, also rested on respondent's fabrication of an entry within his telephone log.

By whatever framework cited by the majority we use to arrive at an appropriate recommendation of discipline, whether by examining the appropriate Standards, balancing all relevant factors, or looking at past decisions for guidance, this record shows grave misconduct, which, collectively, spanned eight of respondent's twelve years of practice. It shows repeated dishonesty and lack of basic adherence to the fiduciary duties of representing a client. Had that misconduct been extended to additional client matters, it could have justified a recommendation of disbarment, even without regard to respondent's prior discipline for trust account mismanagement. (Compare *In the Matter of Brimberry* (Review Dept. 1995)3 Cal. State Bar Ct. Rptr. 390.)

Almost all cases we decide have factual differences with reported decisions. However, I consider the decision of **Borre v. State Bar** (1991) 52 Cal.3d 1047, to be overall very guiding. Borre abandoned an appeal of an incarcerated criminal defendant and defended himself dishonestly in State

Bar proceedings. The Supreme Court characterized as "egregious" Borre's fabrication of an exculpatory letter and his lies about it during State Bar proceedings. Borre had no prior record of discipline, and he had been admitted for 14 years prior to his misconduct in the criminal appeal. The Supreme Court imposed a two-year actual suspension as part of a larger stayed suspension. The majority appears to devalue the guidance of **Borre** primarily because it concludes that Borrẹs' abandonment of his client was more serious than respondent's repeated failure to perform services for Douglas over six years, his deceit of Pacific Bell's agents and his failure to comply with ethical rules on withdrawal from employment. While I do not disagree that Borrẹs' abandonment was extremely serious, as abandonment of an incarcerated defendant's case is presumed to be, the balance of all relevant factors in **Borre**, when measured against the totality of factors in the present case, guide me to conclude that recommendation of the same discipline as in **Borre** is appropriate here. In particular, Borre's lack of a prior record and his much longer practice period before the start of misconduct show more mitigation than in the present case. Also, without condoning Borrẹs' dishonesty, it appears to have been more narrow than this respondent's. In my view, those factors sufficiently equate the seriousness of Borrẹs misconduct with that of respondent's.

Respondent's practice of deceit in this record is highly unusual in California attorney disciplinary cases for its length and variety. Moreover, his clear

disregard of his client's interests covered half of his practice, and his prior record shows that his previously-judged ethical failures also extended to trust account mismanagement. Substantial discipline is warranted. It is needed not as punishment of respondent but as justified protection of the public, courts and legal profession, and to allow respondent "time for introspection so that he will come to appreciate that law is more than a mere business. It is still a profession in which concern for ethics matter." (**In re Morse** (1995) 11 Cal. 4th 184, 210.).

For the reasons stated, I would recommend a two-year actual suspension from practice on conditions of probation recommended by the majority and with a requirement of satisfying the provisions of standard 1.4 (c)(ii) before the actual suspension ends.

STOVITZ, J.

THE SUPREME COURT OF

THE STATE OF CALIFORNIA

In the Matter of	)	Docket No. S101341
	)	Case No. 96-0-03184-EEB
	)	
JUSTIN R. DAHLZ	)	
	)	
	)	
No. 139783	)	
	)	
A Member of the	)	
State Bar	)	
	)	

PETITION FOR REVIEW

Cal. Rules of Court, Rule 952

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THE SUPREME COURT OF

THE STATE OF CALIFORNIA

In the Matter of	)	Docket No. S0101341
	)	Case No. 96-0-03184-EEB
JUSTIN R. DAHLZ	)	**VERIFIED PETITION FOR REVIEW**
	)	Cal. Rules of Court, Rule 952
No. 139783	)	
A Member of the State Bar	)	
_____	)	

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I.

QUESTIONS PRESENTED

1. Does the United States Constitution and rights to due process of law and the requirements of notice permit an appellate entity to base its recommendation of attorney discipline on it changing the noticed charges and adding eight unnoticed ones?
2. Does the United States Constitution and rights to due process of law and the requirements of notice permit an appellate entity to base its recommendation of attorney discipline on an assertion that freedom of speech is an act of moral turpitude?
3. Does the United States Constitution and rights to due process of law and the requirements of notice permit an appellate entity to base its recommendation of attorney discipline when admittedly there was insufficient evidence to sustain the charges?
4. Is not Act of Moral Turpitude as a Quasi-Criminal Disciplinary Offense Unconstitutional for Overbreadth and for Vagueness as Applied to this Speech?

II.

GROUNDS FOR REVIEW

Pursuant to California Rules of Court, Rule 954, review should be granted of the advisory opinion of the Review Department of the State Bar's Court as

1) it is necessary to settle the important issues of law concerning notice requirements in quasi-criminal attorney disciplinary proceedings, 2) the State Bar Court of the State Bar of California has acted without and in excess of its jurisdiction in making up new charges at the appellate level and ignoring the charges filed, 3) petitioner did not receive a fair hearing, 4) the decision is not supported by the evidence, and 5) the recommended discipline is not appropriate in light of the record as a law and the controlling law.

Pivotal to the issues is the action of the appellate department of the State Bar in making up new charges and finding culpability of unnoticed charges, basing its decisions on no law, and then without affording an attorney an opportunity to have notice and an opportunity defend himself and contest this procedure, unlawfully publishing its opinion as a Court of law opinion in a State-wide newspaper. This Court has not granted review to an accused attorney for ten years although finding culpability of unnoticed charges violates the orders of the United States Supreme Court.

III.

FACTS

The petitioner attorney is an attorney for twelve years. He is a native of India. His mother tongue is the Hindi language. This case concerns the

first case he handled upon his admission to the practice of law in California. There was serious prosecutorial misconduct which caused the unfair result.[1] The Review Department judges augmented

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[1] The prosecutor asks the attorney knowing he speaks Hindi as his native tongue, "...In fact, you ponied this document after up after the proceedings were concluded?" RT: 1-61:24. There is no such verb in the English language as "ponied." The prosecutor stated, "I mean, at the very end, what Mr. Dahlz said was that he-if he did anything wrong, he'll accept punishment, but he doesn't get it, and he doesn't get it even though-now, I will certainly give you that he 's not an artful prevaricator, your Honor, but nevertheless, he's a heck of a prevaricator." RT: II-110:5-10. It is disbarable misconduct for an attorney to state her personal opinion of the merits, the credibility of a witness, or her perhaps racist views of the character of her minority member opponent. She states that, "...I don't believe he's outside of the practice of law, an evil man..." Rt:II:110:22-23. She states her personal opinion in closing argument with no citation to any evidence that the attorney is "Double faking." RT:II:48:1819. The entirety of the prosecutor's closing argument is a statement, which is automatic disbarment in federal court, of her personal opinions II:47:1-9-II:61. She states no evidence in support of her personal opinions that there are "multiple misrepresentions to the court," "no doubt entered that to cover himself," he is a "dangerous attorney," he "lied," he made "multiple misrepresentations to [a state bar employee], he was "phonying up of the court document." She compounds this fraud, deceit, disbarable prosecutorial misconduct by continuing her innuendo of slander, hysteria, histrionic, baseless, and unnoticed claims of character assassination of the accused to the bitter end without the Court, even once, fulfilling its mandated judicial duty to take action to discipline this serious prosecutorial misconduct. A competent judge would have

the prosecutorial misconduct by following and adopting that misconduct as their own. They 1) added eight unnoticed charges, 2) ignored the actual charges, 3) ignored the transcript and undisputed facts indicative of innocence, 4) made findings on their unnoticed charges with no clear and convincing evidence to support them, 5) based their recommendation of a one year actual suspension on solely their unnoticed charges for which there was no clear nor any convincing evidence and no notice or opportunity for the accused attorney to be heard, and 6) they then knowingly violated the law by publishing their defamatory findings state-wide knowing that their claims were without any clear or convincing evidence and no notice or opportunity to be heard given to the accused attorney.[2]

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stopped this clear, patent, and obvious misconduct and fulfilled his mandated judicial duties to do so. This judge was not competent . He committed clear judicial misconduct in not only failing to stop the prosecutorial misconduct but by his jumping in and doing it himself. There is abundant evidence suggesting racism in these State Bar employees, prosecutors and judges alike. RT:II:62-114.

[2] The July 9, 2001 Review Department advisory opinion has typed on it Public Matter-Designated for Publication. Exhibit A. Even though a motion for reconsideration was timely filed, the State Bar had already released its opinion to the newspapers causing it to be published as a Court opinion in the Los Angeles Daily Journal on July 17, 2001. No notice of such proposed publication was provided nor any opportunity to be heard in opposition thereto. The publication is deceptive and

offends both the United States and the California Constitution and California law for the following reasons: (1) The constitutional right to privacy contained in the California and the United States Constitution prohibit the State Bar publishing its opinion which is advisory and is subject to a motion for reconsideration and consideration by the California and the United States Supreme Courts and therefore said publication invades the rights to privacy of the attorney in the preliminary stages of a proceeding when no final decision has been made; (2) The California Constitution and the California Rules of Court prohibit the publication of an opinion of the State Bar and its State Bar Court; (3) There is no state law authorizing the State Bar of California to publish any opinions; (4) There is no criteria for publication of a State Bar advisory opinion; (5) The act of publication of an advisory Opinion of the Review Department of the State Bar Court of the State Bar of California is an act of judicial misconduct constituting willful misconduct in office and conduct prejudicial to the administration of justice; (6) The rights to a fair trial and a fair procedure encompassed within the Fifth and Fourteenth Amendments to the United States Constitution prohibit publication of an opinion which taints and impairs the right to a fair trial and a fair procedure. See **In re Rose** (2000), 22 Cal.4th 430, at 438, "The State Bar Court,..is not itself a judicial court established by article VI. It is an administrative assistant," **In re Attorney Discipline System, supra**, 19 Cal.4th at pp. 599-600, **Hirsh v. Justices of the Supreme Court of the State of California** (Ninth Cir. 1995), 67 F.3d 708, "Under California law, attorney disciplinary matters are handled by the State Bar Court ("Bar Court"), an administrative agency affiliated with the California State Bar Association ("State Bar"). Calif. Bus. & Prof. Code section 6086.5.;" Article 6, sections 9 and 14, California Constitution; **United States v. Barnes** (1912) 222 U.S. 513, at 518; **Chistensen** et al. v. **Harris County et al.,** (May 1, 2000) _____U.S. _____ ; **Raleigh & Gaston R. Co. v. Reid,** (1872)

The actual charges were a garden-variety failure to perform competently and communicate with client, abandonment of client, and failure to promptly return file case in one client matter. Exhibit C-2, C-4, C-6. [3] The one unusual charge was an alleged act of moral turpitude in the attorney's speech to the opposing party's claims representative. Exhibit C-7-C-8.

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13 Wall. 269, 270; "..[T]he rules of court, ...have the force of positive law." **Villa v. Superior Court** (1981) 124 Cal. App.3d 1063, 1065;. California Rules of Court Rules 976, 977(a) prohibiyt publication of non Court of Appeals or Supreme Court opinions; **People v. Cruz** (Fourth District, Div. One 1985) 165 Cal. App.3d 648, Justice Lewis, in dissent; Rules of Professional Conduct for attorneys, Rule 7-105); Canon 2, California Judicial Code of Conduct; **Schmier v. Supreme Court** (First Dist., Div. Five 2000) 78 Cal. App.4th 703; **Agricultural Labor Relations Bd. v. Tex-Cal Land Management, Inc.** 43 Cal.3d 696; California Business and Professions Code Section 6094.5; **Wisconsin v. Constantineau,** (1971) 400 U.S. 433, 437. See also **Board of Regents v. Roth**, (1972) 408 U.S. 564, 573; **Owens v. City of Independence** 445 U.S. 622, 633; 100 S. Ct. 1398, 63 L. Ed. 2d 673; **Connolly v. Union Sewer Pipe Co.**184 U.S. 540, 46 L.Ed 679, 22 S.Ct. 431; **Sweatt v. Painter**, (1950) 339 U.S. 629, 635; **Shelley v. Kraemer** (1948) 334 U.S. 1, 22; **Skinner v. Oklahoma** ex. rel. Williamson, (1942) 316 U.S. 535, 541 (quoting **Yick Wo v. Hopkins**, (1886) 118 U.S. 356, 369.

[3] The solicitation and moral turpitude charges concerning the alleged solicitation set forth as counts six and seven were dismissed. Exhibit C-8, C-9.

The prosecutor agreed that the noticed charges are a garden-variety failure to perform case involving one client. RT:II:467-13. The Review Department stated that this garden-variety failure to perform, communicate, release file, and abandonment in one client matter are "multiple acts of misconduct in a single client matter." Exhibit A-1. However, the client had terminated the attorney and settled her own claim obtaining a settlement that was considered most favorable for her. RT: II-90. The client had four workers compensation claims. She was a veteran at it. Judicial notice of the Worker's Comp records indicates this client had four different Workers Comp claims against her employer-Refer Exhibit A to Exhibit D.

The case law indicates a disposition of a private reproval, public reproval, stayed suspension, or, at most, a short actual suspension of up to sixty days would be the disposition consistent with the requirements of non-discriminatory, fair, and equal treatment accorded to this accused attorney.[4]

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[4] The attorney has a prior record involving a stipulation to his allowing funds to fall below the amounts required in two client matters. The instant recommendation of a one-year actual suspension is unheard of in a case of a single instance of garden variety lack of competence, abandonment, failure to communicate, and late delivery of a file. See **Calvert v. State Bar** (1991) 53 Cal. 3d. 1255, and **Wren v. State Bar** (1983) 34 Cal. 3d. 81 (45 actual suspension days).

The record is replete with evidence of unfair treatment, bias, prejudice, bigotry, ethnic discrimination and a denial of equal protection of the law accorded to this minority member of the Bar.

The findings and recommendation of a one year actual suspension deny fundamental due process of law and the equal protection of the law and violate the Supremacy Clause of the United States Constitution. The adjudicators were obligated to follow the decisions of the United States Supreme Court on United States constitutional law concerning the due process and equal protection rights of an accused in a quasi-criminal attorney disciplinary proceeding. They failed to do so. See **In re: Ruffalo** 390 U.S. 544, 550, 88 S. Ct. 1222, 1225, 20 L. Ed. 117 (1968) and **Gentile v. State Bar of Nevada** 501 U.S. 1030, 115 L. Ed. 2d. 888, 111 S. Ct. 2720 (1991).

"Section[s]" refers to sections of the California Business and Professions Code. "Rule[s]," refers to the California Rules of Court. "Opinion" or "Opn." refers to the Review Department Opinion on Review. It is Exhibit A attached to the Appendix. The Transcript of the hearing before the Review Department is attached as Exhibit B. The First Amended Notice of Disciplinary Charges is attached as Exhibit C. The oral "Decision" or "Hearing Decision" refers to the decision of the hearing department judge. "MR" refers to petitioner's motion for reconsideration filed with the Review Department. It is Exhibits D and E. The Opposition thereto,

referred to as "OMR," is Exhibit F. The denial of the motion for reconsideration by the Review Department is Exhibit G. It is referred to as "RDD." The motion and points and authorities in support of leave to file reply to opposition to motion for reconsideration of opinion on review is attached as Exhibit H. It is referred to as "LFR." The petitioner's opening brief to the Review Department is attached as Exhibit I. It is referred to as "OB." The State Bar's Responsive Brief is attached as Exhibit J. It is referred to as "SBR."

The recommendation of a one-year actual suspension for this one garden- variety case appears to be unconstitutional. The Review Department based its recommendation on 1) unnoticed charges, 2) it making up unnoticed charges, 3) interpreting moral turpitude without notice so as to punish the attorney's freedom of speech without a) a compelling state interest or b) a narrowly specific statute, or c) proof beyond a reasonable doubt, 4) basing its decision-making on subjective and unnoticed factors indicative of the State Bar's state of mind of bias and prejudice against a minority member, 5) failing to read the transcript indicating no clear and convincing evidence to support the charges, and 6) in all significant respects failing to adhere to the limitations of the law.

II.

No Notice is Unconstitutional

Three United States constitutional notice requirements issues were violated by the Review Department: Notice of the charges, notice of a moral turpitude interpretation contrary to the United States Supreme Court decisions concerning an attorney's freedom of speech, and changing a noticed charge.

A. Eight Unnoticed Charges is Unconstitutional

As a comparison of the First Amended Notice of Disciplinary Charges with the Review Department opinion indicates, the Review Department made up a new case after the fact. Their new case bears very little similarity to the noticed charges. Exhibit C and A.

The Review Department Opinion added the following eight unnoticed charges: (1) misrepresentation to State Bar investigator in sending a statement of the list of services which included the notation, "Appearance before Ron. George W. Mason on 7\2\96 in Walnut Creek, CA." (Exhibit A-16-A-17), 2) Misrepresentation to State Bar investigator in sending letter stating that the case was settled through a stipulation which resulted in an award and enclosing a signed stipulation when the stipulation filed was without the attorney's signature, (Exhibit A-16-17), 3) misrepresentation to State Bar investigator in statement that, "I have been to the hearing at WCAB in Walnut Creek on July 2, 1996." (Exhibit A-16-17, 4) Presented false testimony in the State Bar Court

when he first said that he did not know if he talked to, or had any communication with his client between the time of signing the substitution of attorneys in 1989 and the middle of 1996 and then said that he thought his client told him that she moved. (Exhibit A-17-18). 5) Presented false testimony when he said in his testimony that he was in contact with his client by telephone. (Exhibit A-17-18), 6) Presented deliberately false testimony when he testified that he did not know the hearing date of the WCAB hearing, (Exhibit A-17-18) 7336 7) Respondent committed multiple acts of dishonesty and moral turpitude when there was one such charge (Exhibit A-20), and 8) "None of those cases involved lying by the respondent to the opposing party, to a State Bar investigator, or to the State Bar Court... He lied to the opposing party about his client's interests in pursuing her claim." (Exhibit A-24)

The transcript of the hearing before the Hearing Department indicates none of the above eight unnoticed charges can be sustained. There is no plausible nor reasonable basis for any of these charges or any of these findings. Exhibit D-19-D-28:1-2, Exhibit 11-26.

1. The Three Unnoticed Charges of Misrepresentation to State Bar Investigator Have No Evidence to Support Them

The Review Department's three unnoticed new charges concerning claimed misrepresentations to the State Bar investigator are the following: (1) misrepresentation to State Bar investigator in sending a statement of the list of services which included the notation, "Appearance before Ron. George W. Mason on 7\2\96 in Walnut Creek, CA." (Exhibit A-16-17), 2) misrepresentation to State Bar investigator in statement that "I have been to the hearing at WCAB in Walnut Creek on July 2, 1996." (Exhibit A-16-17), 3) Misrepresentation to State Bar investigator in sending letter stating that the case was settled through a stipulation which resulted in an award and enclosing a signed stipulation when the stipulation filed was without the attorney's signature, (Exhibit A-16-17).

a. Billing Entry of Appearance was Accurate

In response to an investigation inquiry from a State Bar employee, the attorney sent a letter to the investigator with a copy of what was in his file. This included a copy of the billing statement containing a list of services which he had in his file. On that billing statement, the attorney listed "Appearance before Hon. George W. Mason on 7\2\96." As the transcript indicates this was a truthful statement. The attorney did appear before the Honorable George W. Mason. The client had fired the attorney already. The Workers Compensation board had already sent notices of hearings directly to the client based on a

claim that the client represented herself. The attorney went to the Board to clarify his status. He arrived late and went to the wrong department at first. He then spoke with Judge George W. Mason about what had happened on the case. He was informed that the client had settled her own case directly. As set forth in Exhibit D-20, the following was the only evidence on this issue, RT:I-58 to I-59:1-7:

Q And you didn't appear in court on July 2nd, 1996, did you?

A I was in the wrong department. I went there, but I went in the wrong department. But I saw Judge Mason after the hearing was over.

Q That's your testimony, as you sit here today?

A That's my testimony, sure.

Q And what transpired between you and Judge Mason?

A Judge Mason told me, you know, the client was awarded 'X' number of dollars, and "your presence was not that important because the Court normally safeguards for interest of claimant. However, I got your fees if you want to put a lien." He gave me some green forms to place a lien. I said, "I'm not interested. But I got the green forms from the office of the workers' compensation in Walnut Creek.

Q Calling your attention again to page three.

A Page three, yes.

Q The notes at the bottom.

A Yes.

Q Where it reads "Called 8-15-96. Stip granted on 7-2-96."

A Yes. Yes.

Q Now, is that your handwriting?

A Yes, it's mine.
Q So that appears to indicate that you called the court on 8-15-96, which is a month and a half after 7-2-96 to find out what happened. Isn't that right?
A No.
Q What does that mean?
A It is confirmation of precisely what happened. Because I went there on the day the hearing took place. It was in the afternoon.
Q Did you ever contact any of the parties afterwards?

(RT:I-58 to I-59:1-7)

Not only was the charge unnoticed, the only evidence on the issue indicated that the attorney did appear before the Honorable George Mason. The attorney did not represent that he was at the hearing. The billing statement indicated he appeared before the Judge and he did. This is the only representation being made, and it was truthful.

In an attorney disciplinary proceeding, there must be convincing proof to a reasonable certainty and any reasonable doubts must be resolved in favor of the accused. (**Himmel v. State Bar** (1971) 4 Cal.3d 786, 794, 94 Cal Rptr. 825, 484 P.2d 993; **Zitney v. State Bar** (1966) 64 Cal. 2d 787, 789-790, 51 Cal.Rptr. 825, 415 P.2d 521.) [R]easonable doubts must be resolved in favor of the attorney. **Price v. State Bar** (1982) 30 Cal 3d 537, 547; **Emslie v. State Bar** (1974) 11 Cal 3d 210, 226. All reasonable doubts are to be resolved in favor of the attorney. (**Alberton v. State Bar** (1984) 37 Cal.3d 1, 11-12

[206 Cal.Rptr. 373, 686 P.2d 1177, A.L.R.4th 1487].) "[A]ll reasonable doubts in favor of the accused [must be made] and if equally favorable inferences may be drawn from a proved fact, the inference which leads to a conclusion of innocence rather than one leading to a conclusion of guilt will be accepted." (**Lee v. State Bar**, **supra**, 2 Cal.3d at p. 939; see also **Zitny v. State Bar** (1966) 64 Cal.2d 787, 790; cf. **Lubetzky v. State Bar, supra**, 54 Cal.3d at p.318). Where the respondent's version is plausible, even when controverted, it supports a reasonable inference of lack of misconduct. (**Davison v. State Bar** 17 Cal.3d at pp. 573-574.). When the issue is whether the speech of an attorney is not true, the burden of proof is proof beyond a reasonable doubt. **Siegel v. Committee of Bar Examiners** (1973) 10 Cal. 3d. 156, 179).

The Review Department admitted for it to make a finding that the attorney made misrepresentations, they had to find that there was proof beyond a reasonable doubt. As stated in its Opinion, Exhibit A-16, "[T]he determination that a witness's [sic] testimony lacks candor (i.e. the witness is lying) must ordinarily be found by clear and convincing evidence. (Stds. 1.2(b), 1.2 (b)(vi); but see **Siegel v. Committee of Bar Examiners** (1973) 10 Cal. 3d. 156, 179) [in cases involving an applicant's exercise of a First Amendment right of free speech, the committee must prove the applicant to be lying beyond a reasonable doubt." They ignored their knowledge of the high burden of proof. They made

up eight unnoticed, serious, defamatory, and scurrilous charges and findings with no evidence of any kind to support their findings and no notice. Then they illegally published them state-wide barring the accused from filing his motion to set aside this unfair ambush of an attorney. Refer footnote 2.

b. Stipulation Statement was Accurate

The opinion states that the attorney's letter to the State Bar says, "Please be aware that complainant's case was settled through a stipulation which resulted in an award of $1785.00 to claimant and future medical expenses (see exhibit B)." Exhibit A-16. This was truthful. The stipulation, which was attached as Exhibit B, was truthful. The fact that the attorney signed it in his office, rather than in a hearing does not make the statement untruthful. The unnoticed charge that the attorney "sent the investigator a copy of the stipulation with the intent to deceive the investigator into believing that respondent had actually appeared at the July 2, 1996 trial and represented Douglas in settling her claims" is not borne out by the language of the attorney. All the attorney represented was that the case settled. He attached the office copy of the stipulation, not for the purpose of misleading, but for the purpose of showing that the case settled. This was true. The attorney did not represent he was at the hearing, either in the stipulation or in his billing entry. He did not represent he was sending the stipulation filed with the Workers

Compensation Board. He did appear before Judge Mason after the hearing. His signature on a copy of the stipulation was his signature on his copy. All that the attorney said was truthful. There was no deception nor any attempt to deceive nor any evidence of either.

c. "I have been to the Hearing was Inartful," but not False

The client's complaint after she fired the attorney was that he abandoned her. The client did not wait for her terminated attorney to arrive at the hearing. She went ahead and settled the case on her own. With four workers compensation claims she had had, she was no amateur at settling her own case. The attorney did go to the hearing. He arrived late and went to the wrong department. When he found Judge Mason, he found out that the client had already settled her own claim on her own. Thus, when he said in his letter to the investigator, "As you have been made aware, I have been to the hearing at the WCAB in Walnut Creek on July 1, 1996," this indicates that the attorney had already orally provided the investigator with the facts about his late appearance at the hearing. Since this is one of the eight unnoticed charges, neither the investigator nor the attorney testified about this issue. There was no evidence on this issue. With no evidence of any kind, this unnoticed charge has no support in the record.

The bias against minority members of the State Bar by its employee judges and prosecutors is apparent. This attorney's native language is Hindi. He speaks with a noticeable accent. English is not his native tongue. No native-born attorney would have been subject to such nitpicking and vicious slander over an inartful use of the English language and such has never happened in the history of the State Bar.[5] The hearing transcript shows repeatedly that the attorney misstated English words and meaning. He did not do so deliberately. He did so out of lack of familiarity with the more vulgar aspects of the English language. "Maybe she didn't like the tone of my voice, my accent, I don't know. People have all kinds of prejudices" the attorney said in his testimony. RT: 1-38:9-11. He called the work of an attorney handling the referral of a client to another attorney "the dirty work." RT:-II-3:16. In reading a letter from another attorney, the attorney said, "English is a very funny language." RT: 7:3-6. The attorney said, "I just want to tell you the nemesis of this letter." The attorney meant the "genesis" of the letter. RT:II:7:11. The attorney said, "She was talking to me and I just

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[5] Racism is often buried under a subterfuge of name-calling as occurred repeatedly in this case. "Liar, cheat, fabricator, deceiver, fraud," are common epithets used to hide the fact that the name-caller is a bigot and filled with hatred and prejudices against those who speak differently and come from other countries. This Opinion not only has no noticed charges nor facts to support it, it is filled with racism.

couldn't understand two words." RT: I-23:9. The letter written by the attorney to the claims representative of the employer states, "We have been in contact with our client, Michele Douglas, and she is missing. She fully intends to pursue her captioned claim." RT:I-29: 7-14. In his testimony, he stated, "I was in contact with her by telephone, I think, not by the letter. She not send me the letter. I think I call her, and at that time she told me to go ahead and pursue the claim." RT:I-29:23-25, I-30:1.

There was no evidence of "lying" as claimed by the Review Department. There was no evidence of any deception. There was no evidence of any intent to deceive. The investigator had the client complaint claiming that the attorney did not appear and had the record of it. No attorney would attempt to refute what was obviously information already in the possession of the investigator. The only evidence is that of a non-native born attorney misunderstanding the colloquial or vulgar terms used by some persons in the English language. That is not a disciplinary offense nor may it be consonant with the equal protection of the law requirements of the fourteenth and fifth amendments to the United States Constitution and the decisions of the United States Supreme Court.

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2. The Three Unnoticed False Testimony Charges Have No Clear and Convincing Evidence to Support Them

The three unnoticed charges and finding that the attorney's testimony in the hearing was "false in several respects" has no support in the record. Exhibit A-17. The three new unnoticed charges of providing false testimony are 1) the attorney could not remember speaking to the client, then claimed that he thought she had told him that she had moved, (Exhibit A-17-18), 2) the attorney said that he was in contact with his client by telephone, (Exhibit A-17-18), and 3) the attorney said that he did not know the hearing date of the WCAB hearing. (Exhibit A-17-18).

a. Since The Client Admitted that the Attorney Did Speak to Her, the First Two Unnoticed Charges of False Testimony Have no Evidence

The unnoticed charges and findings that the attorney did not speak with the client are patently false as the client testified that the attorney did speak with her. Her testimony confirms there was not only no evidence to support the moral turpitude charge, there is absolutely no evidence to support the findings of deceit, dishonesty, or claimed lying.

The client testified as follows, RT: I-109: 2-25, I-110:1-12:

Q. At some time, did you hear from Mr. Dahlz?
R. Yes.
Q. Do you remember when that was? Just generally.
A. It was in March of 1996.
Q. And can you tell us what was said in that call? Did he call you, first of all?
A. He called me at work.
Q. What did you say to him?
A. He called and said, "I'm your attorney on you worker's comp case."
Q. What did you say?
A. I asked him which case. "How many cases do you have?" I said, "Which case are you talking about?" He refused to tell me which case he was talking about, because at that time I did have the ankle case going on, and he did not sound like the attorney who was helping me on that, and that attorney would not have called me at work.
Q. Why not?
A. He had my phone number. He knew how to get a hold of me. He knew that I was home in the morning."

The finding that the attorney's claim that he spoke with the client by telephone to pursue her claim was completely truthful. Nothing, except prejudice, explains the finding that the attorney lied in claiming he spoke with the client when the client admitted that he did speak with the client. Exhibit A-18. the unnoticed charges and findings have no evidence to support them. They are pure fabrication by the Review Department.

b. Attorney's Belief that the Client Had Moved is Truthful

The opinion admits that the attorney said "But Douglas, I think... told me she moved from Benicia to another place...." Exhibit A-17-18; RT: I-21:24. The record indicates that employer for the client Douglas also had a different address for this client. Exhibit I-39 to I-43 to Exhibit D. The attorney's statement is not only actionable as a statement of opinion or belief. It is not actionable also as it is immaterial. There was no evidence presented that the attorney's statement of his opinion was false, knowingly false, or could be the basis of anything. Certainly on its face it is not, as claimed, a lack of candor, lying, deception, fraud or moral turpitude. It is not actionable on its face as well as totally unnoticed.

c. No Evidence the Attorney Knew The Hearing Date

The third unnoticed charge of false testimony is the claim that "the attorney testified that he did not know the hearing date of the WCAB hearing for Douglas.... " (Exhibit A-18). The finding that "The question was clear and unambiguous. We find that respondent's testimony in this regard was deliberately false," has no evidence to support it. Exhibit A-18. In fact, the Opinion is false and fraudulent. The

question was ambiguous. The question was not clear. And there is no evidence of any falsehood in the testimony. The attorney testified that "I did not know there was a hearing. When the trial briefs are filed, I don't think I was provided with a copy of the trial brief." (He wasn't. The judge instructed Ms. McPeake to serve the client). RT:I-53:5- 8. He was then asked the question, "Are you telling me that you were not notified that the matter was going to hearing on July 2nd?" and he responded, "That's true." RT: II-53:21-23. He was then shown a notice of hearing of July 2nd, and he was asked, "And it's got your handwritten notes all over it, doesn't it?" to which he responded, "Yes." He acknowledged this was served on April 2, 1996. He was then asked, "What, if anything, did you do after you received-so your answer before was incorrect. You did receive notice of the hearing prior to the hearing?" to which he responded, "No. I thought the question was whether I received a copy of the trial brief, and I said no.... No, I did not get a copy of the trial brief." RT: I-I-54-55:1-3. Please note that the question asked was not whether he knew about the date of the hearing, but whether he knew that it was going to hearing on that date. In sum, the question was not what the Opinion claims. The question had a predicate to it-did the attorney know that it was going to hearing on the date-and the attorney truthfully answered that he did not know it was going to hearing. He did not know it was gong to hearing as he did not receive the trial briefs as they were not served on him. Since the client had already

terminated his services and the judge had told the Ms. McPeake to serve the client with papers, this is a truthful, honest, and completely accurate response.

3. No Charges of Multiple Acts of Moral Turpitude

The Opinion rests on the Review Department changing and adding new charges of their own. While there was one act of moral turpitude noticed charge for which there was no clear and convincing evidence, the Review Department without notice changed the charges to "Respondent committed multiple acts of dishonesty and moral turpitude" when there was one such charge. (Exhibits A-20 and C).

4. New Charges of Lying were Never Noticed

The Review Department's opinion states that none of the relevant cases involved "lying by the respondent to the opposing party, to a State Bar investigator, or to the State Bar Court.... He lied to the opposing party about his activity on the case and later lied again to the opposing party about his client's interest in pursuing her claim..." (Exhibit A-24). There were no such charges. There was not one whit of evidence of any lie anywhere in the entire transcript.

There is no evidence of any kind to support the eight unnoticed new charges of the Opinion. There

was no clear and convincing evidence of any false testimony made by the attorney at the State Bar hearing. There is no evidence of any kind to support the charges of any misrepresentations to the State Bar investigator. There is no evidence of any deceit, fraud, misrepresentation, or "lies" as the Review Department claims. The findings are based solely and exclusively on fabrication by the Review Department. They made up a non-existent record.

The Court's manufacturing of eight new unnoticed charges converts the noticed charges to being an irrelevancy and coerces speech for financial gain of the State Bar since it makes money quickly and easily for itself from every coerced settlement based on its terrorizing of lawyers with unnoticed lack of candor claims (refer section 6140 of California Business and Professions Code). This renders the proceedings devoid of due process of law.

The extent and nature of the manufacturing of eight clearly erroneous and false new charges is shocking. Not only were the above charges made up after the trial was concluded, but the Review Department made up its own new charges. In addition to the above, the Review Department claims that the "magnitude of the misconduct is substantial," that the attorney "committed multiple acts of dishonesty and moral turpitude" knowing there was, in fact, only one charge-of allegedly saying in a telephone conversation four years earlier that the client did not wish to pursue a claim, makes new claims of "lying …to the opposing party (a claim never made nor addressed anywhere),

to a State Bar investigator (a totally unnoticed and unsupportable claim), ... [and] to the State Bar Court (a totally unnoticed and unsupported claim)," "he lied to the opposing party about his activity in the case (never a charge made and for which there is no evidence nor any claim to any), later lied again to the opposing party about his client's interest in pursuing her claim (a totally refuted claim borne out by the record), to the potential detriment of the client (no evidence of any potential detriment as the attorney never signed the letter asserting that he said that), ...in substantial aggravation he attempted to mislead the State Bar investigator in at least two instances (an unnoticed and refuted claim), and [the attorney was] found culpable of a lack of candor in his testimony before the hearing department (an irrelevant fact as the judge was guilty of serious judicial misconduct as set forth herein)." Exhibit A-24.

That the Court is making up its own new charges is best evidenced by its conclusion that, " We make this recommendation because of the serious moral turpitude involved in respondent's deliberately attempting to mislead the State Bar investigator, his false testimony before the hearing department of this court, and his lying to the opposing party to the potential detriment of his client." Exhibit A-25. At the commencement of its Opinion, it knew that it was violating the order of the United States Supreme Court that only noticed charges may be the subject of discipline and it knew it was going to make up its own new charges without notice or an opportunity for the

attorney to defend himself. It said at the very beginning of its opinion the following at Exhibit A-1:

> "Respondent, Justin R. Dahlz, seeks our review of a hearing judge's decision in which the hearing judge found respondent culpable of misconduct in a single client matter. **Of at least equal, if not greater concern** (emphasis added) are the hearing judge's findings of deception by respondent in dealings with (1) the opposing party in the underlying action (2) the State Bar investigators investigating the complaint of his client and (3) the State Bar Court in the presentation of testimony and exhibits before the hearing department."

The truth in the actual records is that the attorney is honest and truthful. The prosecutor is guilty of disbarable misconduct. The judges committed egregious acts of judicial misconduct. The judicial misconduct issues concerning the conduct of the Review Department judges are clear. They hae been previously placed on notice that it is judicial willful misconduct in office to change charges, to make claims that are not supported by any evidence in the record, to fail to act competently, and to act on a financial interest in the State Bar party. The attorney is entitled to a decision reversing the judgment.

The fact that undeniably eight new charges were added indicates that this proceeding rested on charges never made and about which the attorney was denied all opportunity to appear, defend, present

evidence or be heard and for which there was no clear nor convincing evidence of any kind.

B. The Moral Turpitude Charge was Changed And There Was No Clear and Convincing Evidence to Support It

There are five additional constitutional violations concerning the Review Department's handling of the one moral turpitude charge. There was no evidence to support the one noticed moral turpitude charge. While the Review Department admitted it had to prove the attorney's speech was moral turpitude beyond a reasonable doubt, it applied no standard of proof of proof or of evidence. The moral turpitude charge concerning the attorney's speech is unconstitutional for vagueness as applied and lack of notice. The act of moral turpitude statute is unconstitutional on its face for over breadth in quashing and chilling protected freedom of speech.

1. There was no Clear and Convincing Evidence the Attorney's Speech to the Opposing Party was a Lie

The First Amended Notice of Disciplinary Charges, in reference to the one moral turpitude claim, alleges that, "In addition to advising McPeake [the opposing party's claims representative] on or about March 14, 1996 that he did not intend to appear at a scheduled WCAB conference on March 28, 1996

on behalf of his client, Respondent also informed McPeake that his client did not wish to pursue the WCAB matter. In fact, Respondent had not spoken with his client and it was Douglas' desire to prosecute her case. By advising McPeake that his client did not want to pursue her WCAB matter, Respondent intentionally misrepresented the position of his client and committed an act of dishonesty. By the foregoing conduct, Respondent willfully violated Business and Professions Code, section 6106." Amended Notice of Disciplinary Charges: Count five, 7:19-29, 8:1-9. The Opinion states that, "...[We independently review the record and may make findings and conclusions at variance with the hearing judge ... we must still independently review the record to determine whether all of the hearing judge's findings and conclusions of law are supported by the record." The Opinion states that, ""...[T]he hearing judge found that ...respondent committed an act of dishonesty in violation of ... by misrepresenting, to an opposing insurance adjuster, that the client no longer wanted to pursue her claim." It then states that, "We adopt the hearing judge's finding that respondent committed an act of dishonesty in violation of section 6106 when in March 1996 he misrepresented to McPeake that Douglas no longer wanted to pursue her claim." Exhibit A-14.

The hearing judge stated in his decision that, "On March 14, 1996, Respondent telephoned the employer and stated that Douglas did not intend to pursue the matter. ... McPeake, the employer's

hearing representative, sent Respondent in a letter asking him to sign and return a copy of her letter confirming his intention not to proceed; he did not respond. The Court does not find credible Respondent's denial that he made this statement of intent not to pursue the matter." Hearing Decision 2:24-28.

The Review Department Opinion errs as a matter of law as an independent review of the record indicates that the hearing judge misstated the evidence; there was no clear and convincing evidence of the claimed act of moral turpitude; there was no act of moral turpitude; the required burden of proof of beyond a reasonable doubt applicable to this speech was never mentioned nor applied; and no claim is made that the requisite burden of proof was carried. As stated in the Review Department opinion, Exhibit A-16, [T]he determination that a witness's [sic] testimony lacks candor (i.e. the witness is lying) must ordinarily be found by clear and convincing evidence. (Stds. 1.2(b), 1.2 (b)(vi); but see **Siegel v. Committee of Bar Examiners** (1973) 10 Cal. 3d. 156, 179) [in cases involving an applicant's exercise of a First Amendment right of free speech, the committee must prove the applicant to be lying beyond a reasonable doubt." The Review Department Never stated it was applying any burden of proof. The transcript indicates it applied no burden of proof or of evidence.

The transcript bears out that there is not only no compelling state interest in seeking to sanction this

freedom of speech, there is absolutely no basis for any claim to any believable evidence in support of such a claim.

Ms. McPeake, the Pacific Bell hearing representative to whom the statement was allegedly made and who was the attorney's opposing party's employee, testified that she was retired on July 19, 1996, but went back to work as an independent contractor for Pacific Bell in 1997 and stayed until 1998. (RT:II-2-3:1-11). Prior to starting work for Pacific Bell in 1985 she was "home playing Mama." RT:II-4:1-10. Her responsibilities at Pac Bell started as a paralegal and then she trained to be a hearing rep for Pac Bell. RT:II:4:14-18. She has never met nor seen the accused attorney before. RT:II-5:9-11-13. Her responsibility in the Douglas case was to settle it. RT:II-5:23-25, II-6:1-4. She spoke with the accused attorney once. "There was one telephone conversation." RT:II-6:9-10. That one conversation would "have been early in '96, the first couple of months of '96." RT:II-6:9-14. She was then asked, "And to the best of your memory, can you tell us what transpired in that conversation?" She responded, "Well, as you know, it's been a long time, but Mr. Dahlz indicated that his client was not going to pursue the case." RT:6:15-18. She then testified that the next day she prepared a letter for the attorney seeking his signature to it confirming that his client did not wish to pursue the claim. The attorney never signed nor returned the letter. RT: II:8-10: 1-2. Considering the fact that Ms. McPeake is elderly, she had one

telephone conversation with the attorney, that she was wrong about the dates the telephone conversation took place, that she was anxious to retire in a few short months, that she was probably anxious to settle her remaining cases before retiring, the fact that she sent a letter trying to close out another file by claiming that the attorney said that the client did not wish to pursue the claim is not probative that the attorney ever said such a thing. The fact that the attorney never signed the letter nor returned it indicates that he did not agree to such a statement having been made by him nor Ms. McPeake's interpretation or misinterpretation of what he said. The testimony on the issue is equivocal. Ms. McPeake couched her response in terms of "Well, it's been a long time." RT:6:15-18. She was wrong on the date. In sum, she was unsure in her testimony. Her claim is uncorroborated. Her personal issues and plans of imminent retirement easily may have affected her recall of the conversation. It may have been just her wishful thinking that she had closed another case. More probably than not it was the dream of a retiring person to close another file before leaving.

The attorney's testimony was far more definite and clear. He did not make such a statement. He might have expressed a belief that his client did not wish to pursue a claim or that he thought she might not wish to do so, but there was no admission nor impeachment evidence that he definitely stated as a fact to his opposing party's employee that the client did not wish to pursue the claim. The entirety of the

attorney's testimony on the issue was as follows, at RT:1-38:23 to 1-39: 1-3; then to I-39:1-3, 20-25, I-40-41:1-7:

Q. Now, you told Ms. McPeake that your client did not intend to pursue her case, didn't you?

A I did not make a categorical statement like that. I think what I told Ms. McPeake was, "I'm trying to get a hold of my client. She does not seem to be interested." And I think I had a note there."

Q Mr. Dahlz—

A Excuse me ma'am.

Q – did you tell Ms. McPeake that your client was not interested in pursuing her case? Yes or no?

A. Unilaterally, no.

Q What did - - okay. Let's go back to the State Bar Exhibit 10, page 14 again. This is the log.

A Yeah. Fourteen. All right. I got it.

Q Coming down now about half the way on the page to the entry beginning 3-13-96. Again, this is your handwriting, is it not?

A Right.

Q Would you read for us the rest of that page.

A Beginning with?

Q 3-13-96

A 3-13-96

"Called 1-510-671-1910. Comes to work 3:30 p.m. Called 1-510-671-1910. Initially stated that she is now working and cannot discuss the matter. However, when I gave the details, asked me where I was all these years. Surprised that I was not Richard Ivanhoe. Told me she had to see doctor upon court order and that basically not interested in pursuing this matter."

Q Keep reading, Mr. Dahlz.

A I think the next day, 3-14, I think.

'Called Rita McPeake, Pac Bell, 542-2383 and relayed above message. Will send me documents.'

Then 3-18, 'Telephoned client.' The number is not very legible, but I think it's 1-510-671-1910, I think. And I left a message for her, I think.

Q Okay. So here we have this note. And that's in your handwriting, right?

A This is my handwriting, yes.

Q And did you make that on or about 3-14-96?

A I think so.

Q So did you or did you not tell Rita McPeake that her – your client wasn't interested in pursuing her case?

A I did not make a categorical statement to Ms. Rita McPeake or anybody else. I would couch my language, I think my client does not want to pursue the claim. And let me tell you - - can I add something to this? Rita McPeake thought that I had made a categorical statement that my client does not wish to pursue her claim, and therefore, she sent me a document, I think, asking me to sign the document, and I did not sign the document.

Q And you never called her up and talked to her about the document either, did you?

A That, I do not remember.

Q Bit - - okay. But if you had, you would have made an entry in this log, wouldn't you?

A As I said, I was not a very good lawyer to make – the lawyer – the thing I do and talk. (Court reporter could not understand the attorney here-sic). I may have called her. I may not have called her, ma'am. I don't know.

(RT: I-38:23-28, I-39-40, I-41:1-10)

Since the above testimony is the totality of the evidence on the issue, and it would not carry a civil suit's preponderance of the evidence required standard of proof, it was an error of law to assert an independent review of the record sustained the finding

of an act of moral turpitude based on a claim that the attorney in one telephone conversation four years earlier allegedly said his client did not want to pursue a claim to his opposing party. This claim has no credibility. It was from a retired person who had a less than sure memory of what had been said four years earlier. She was the attorney's opposing party's representative. She had a natural antagonism to not be truthful in her testimony against her opponent. The claim was never confirmed by any subsequent act of the attorney. The attorney expressly repudiated the claim by his refusal to sign a statement prepared by Ms. McPeake, his opposing party's representative, that he had made such a claim. The claim that this occurred has no support in the record.

2. The Review Department Changed the Moral Turpitude Charge without Notice

The noticed moral turpitude charge alleged the attorney stated to an opposing party that his client "did not wish to pursue ... the claim." Exhibit C-7-8. The hearing judge changed this charge without notice or opportunity to defend to a claim that the attorney said his client, "did not intend to pursue the matter," a charge never made. The Review Department then changed the charge again, once again without notice or opportunity for the attorney to appear or defend, to a new charge that the attorney "misrepresented ... that [his client] no longer wanted to pursue her

claim." Exhibit A-14. The Review Department then misstates the actual transcript and claims that the "attorney telephoned [the opposing party's representative] and unequivocally told her that [his client] ... did not intend to pursue her claim." The actual transcript set forth above bears out the patent falsity of this claim. There was no evidence to support either the noticed or the unnoticed moral turpitude claim.

3. The Moral Turpitude Charge Violates the Notice Requirements

As held by the United States Supreme Court in **United States v. Laub** 385 U.S. 475 (1967), "Crimes are not to be created by inference. They may not be constructed *nunc pro tunc.* Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. As this Court said in **Raley v. Ohio**, 360 U.S. 423, 438, we may not convict `a citizen for exercising a privilege which the State clearly had told him was available to him." As **Raley** emphasized, criminal sanctions are not supportable if they are to be imposed under "vague and undefined" commands (citing **Lanzetta v. New Jersey**, 306 U.S. 451 (1939)); or if they are "inexplicably contradictory" (citing **United States v. Cardiff**, 344 U.S. 174 (1952)); and certainly not if the Government's conduct constitutes "active

misleading" (citing **Johnson v. United States**, 318 U.S. 189, 197 (1943))."

A statute that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." **Connally v. General Construction Co.**, 269 U.S. 385, 391 (1926). The Fourteenth Amendment's Due Process Clause "[insists] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." **Grayned v. City of Rockford**, 408 U.S. 104, 108-109 (1972). This requirement "applies with particular force in review of laws dealing with speech," **Hynes v. Mayor of Oradell,** 425 U.S. 610, 620 (1976). "A man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser," **Smith v. California**, 361 U.S. 147, 151 (1959). These guarantees apply fully to attorney disciplinary proceedings. **In re Ruffalo**, 390 U.S. 544, 550 (1968).

The Opinion fails to state any of the controlling law from the United States Supreme Court which compels a finding that the act of moral turpitude statute and the new unnoticed charges of a lack of candor are unconstitutionally vague and that it is both irrelevant whether the statute clearly applies to the accused in invalidating the statute and any discipline based on it and that any claim to avoiding a declaration of vagueness by asserting that the statute

clearly applies to the conduct at issue does not apply to a statute that has no core and has been sought to be applied to solely the attorney's speech.

There is no claim that the speech at issue is "conduct [to which the moral turpitude] statute {or the new claimed charge of lack of candor] clearly applies." **Parker v. Levy** (1973) 417 U.S. 733, 756 [41 L. Ed.2d 439, 457-458, 94 S.Ct. 2547].) First there is no act. There is solely speech. Statements of belief or opinion are not disciplinable as an attorney has a freedom to believe that which he wants to believe.

As held in **Levy,** at 754, the bar to raising a vagueness challenge applies only when the conduct is clearly, based on noticed language and case law, clearly proscribed by the plain meaning of the words. There the Court held that, "...[T]here also cannot be the slightest doubt under the military precedents that there is a substantial range of conduct to which both articles clearly apply without vagueness or imprecision. It is within that range that appellee's conduct squarely falls, as the Court of Appeals recognized: `Neither are we unmindful that the Manual for Courts-Martial offers as an example of an offense under Article 134, `praising the enemy, attacking the war aims of the United States, or denouncing our form of government.' With the possible exception of the statement that `Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children,' it would appear that each statement for which [Levy]

was court-martialed could fall within the example given in the Manual."

The Court noted that the Levy military court martial case case did not present the issue that there was no core to the regulations, and that the defendant "had fair notice from the language of each article that the particular conduct, which he engaged in, was punishable. This is a case, then, of the type adverted to in **Smith v. Goguen**, in which the statutes "by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain." **Levy,** at 756.

The act of moral turpitude rule has been abolished by the forty five states following the American Bar Association's Model Rules of Professional Conduct as the ABA has held that the term is too indefinite and imprecise to satisfy the constitutional requirements of adequate notice to an attorney of that which he may and that which my may not do. Constitutionally, act of moral turpitude is limited to cases involving a specific intent to defraud and findings of fraud or the most heinous of crimes, to wit, murder or manslaugter.

Since there is no notice that the act of moral turpitude statute would apply to this speech to a claims representative that is irrelevant speech, the Opinion is required to be voided and vacated for lack of notice.

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V.

The Lack of Notice Compels a Dismissal

The fact that the Review Department admits its recommendation is based on its eight new unnoticed charges and its change in the one moral turpitude charge indicates there was no harmless error. In all events, the United States Supreme Court has held that harmless error analysis does not apply. Dismissal of a proceeding is required as "These are adversary proceedings of a quasi-criminal nature. C.f. **In re: Gault** 387 U.S. 31, 33. **The charge must be known before the proceedings commence.** (emphasis added). **In re Ruffalo** at 552.

An attorney is entitled to sufficient time to prepare and defend and fair notice of the facts relied on in support of a claim, so he may prepare and defend. **In re: Gault** 387 U.S. 31, 34, 18 L. Ed.2d. 527, 87 S. Ct. 1428 (1967).

Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are in fact. See **In re Gaunt, supra,** at 33-34, and n. 54 (1967). Procedural due process rules were meant to protect persons not from a deprivation, but from the mistaken or unjustified deprivation. **Carey v. Pipes** 435 U.S. 247, 259, 98 S. CT. 1042, 1050, 55 L.Ed.2d. 252 (1978) Thus, they impose constraints on government action. **Matthew's v. Eldridge** 424 U.S. 319, 332, 96 S. Ct. 893, 901, 47 L.Ed. 2d. 18 (1976). In

operation, due process requires notice of the cause or causes in sufficient detail and sufficient time to fairly enable a party to show any error that may exist, the right to be advised of the names and the nature of the violation alleged, the right to a meaningful opportunity to be heard in his own defense, and a hearing before a tribunal that both possesses some academic expertise and has an apparent impartiality towards the claims. **Pickering v. Board of Education** 391 U.S. 563, 578 n.2, 88 S. Ct. 1731, 1739 n.2, 20 L. Ed.2d. 811 (1968) **Pickering v. Board of Education** 391 U.S. 563, 578 n.2, 88 S. Ct. 1731, 1739 n.2, 20 L. Ed.2d. 811 (1968) See also **Goss v. Lopez** 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d. 725 (1975). An accused must be given written notice informing him of the specific issues that he must meet, at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation. **In re: Gault, supra,** at 31-34.

"Proceeding which deny notice or hearing, or provide inadequate methods, are lacking in due process." See **Morgan v. United States** (1936) 298 U.S. 468, 56 S. Ct. 906, 80 L. Ed. 1288; 304 U.S. 1, 58 S. Ct. 773, 82 L. Ed. 1129; **Ohio Bell Tel. Co. C v. Public Util. Com**. (1939) 301 U.S. 292, 57 S. Ct. 724, 728, 81 L. Ed. 1093, 1099. As held in **Schware v. Board of Bar Examiners**, 353 U.S. 232, 238-239 "An attorney may not be excluded from the practice of law in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment."

At every stage, the accused was denied notice of the issues and facts which he was required to meet, to present any information or briefs or law or evidence, and to have findings based on facts, which admittedly the Opinion states are absent, and to have conclusions of law based on law and on proven and citable facts, which the Opinion admits it lacks.

Based on the multiple constitutional violations by the Hearing Department and the Review Department of the State Bar's Court in proceeding without notice, without a meaningful opportunity to be heard in a meaningful manner, without any rights to evidence, to confrontation, to cross-examination, and the right to findings of fact and conclusions of law based on the law and the facts, the right to notice of and the right to be heard on appeal and to have notice of any new claims and any new proposed changes to existing law and an opportunity to present the law concerning the constitutionality of such proposed new law changes, the remedy for these abuses is to issue the required order dismissing the proceeding and to withdraw the defective Opinion that admits it is violating the constitutional rights of the accused in its findings and conclusions of law.

The United States Supreme Court in **Saunders v. Shaw**, 244 U.S. 317 (1917) reversed a case and rendered judgment absolute against the party who succeeded in the trial court upon a proposition of fact which was ruled to be immaterial at the trial and concerning which the party had no proper opportunity to introduce his evidence. This rendering of a

decision on an issue not properly pled, raised, or tried compelled reversal of the State Supreme Court decision. So much of a judgement which exceeds the issues noticed and litigated is void. **Baar v. Smith** 201 C 87, 255 P. 827.

VI.

Act of Moral Turpitude Applied to This Speech Is Unconstitutional for Over breadth

The Opinion fails to address the overriding constitutional issue of over breadth of the statute prohibiting in any capacity "any act of moral turpitude" (Section 6106) or lack of candor. (Std. 1.2(b)(vi), Rules of the State Bar, Standards. The Opinion finding an act of moral turpitude and lack of candor is required, as a matter of adherence to the Supremacy Clause of the United States Constitution, to be reversed and an order entered exonerating the accused of the act of moral turpitude and lack of candor charges.

Over breadth analysis addresses whether the statute reaches a substantial amount of speech and fails to have the two requirements for a restriction on the first amendment right to freedom of speech, to wit, a compelling state interest and a narrowly drafted statute which targets solely the speech which the State has a compelling state interest in chilling, quashing, censoring, condemning, or punishing. As held in **Buckley v. Valeo**, 424 U.S. 1, 60-68,96 S.Ct. 612,

654-658; 46 L.Ed. 2d 659 (1976),"any infringement on such rights must be based on a compelling governmental interest; even then, the state must demonstrate that it has chosen the least restrictive means to further such an interest." **Buckley v. Valeo**, 424 U.S. 1, 60-68, 96 S.Ct. 612, 654-658; 46 L.Ed. 2d 659 (1976) The statute is unconstitutionally broad when it is susceptible of application to conduct protected by the First Amendment. (See **Dandridge v. Williams** (1970) 397 U.S. 471, 90 S. Ct. 1153."

Even one to whom the statute applies may challenge a statute for over breadth. **Pottinger v. City of Miami** 810 F. Supp. 1551 (S.D. Fla. 1992) (S.D. Fla. 1992). Over breadth relates to whether the statute or rule intrudes upon conduct which is protected by the United States Constitution, including freedom of speech. **Broderick v. Oklahoma** 413 U.S. 601, 613, 37 L. Ed. 2d. 830, 93 S. Ct. 2908 (1973) 413 U.S. 601, 613, 37 L. Ed. 2d. 830, 93 S. Ct. 2908 (1973). See **Gentile, supra.** Such statutes or rules are "not restricted to the evil with which they are said to deal." **Butler v. Michigan** 352 U.S. 380, 383, 77 S. Ct. 524, 526, 1 L.Ed.2d. 412 (1957). Such statutes require a greater degree of specificity and precision than is required to fulfill due process or equal protection requirements. **Adamian v. Jacobsen** 523 F. 2d. 929 (Ninth Cir. 1975), appeal after remand 608 F.2d. 1224, cert. denied 100 S. Ct. 2158, 446 U.S. 938, 64 L. Ed. 2d. 791. Such statutes or rules seek to burn the house down to roast the pig and chill the exercise of

protected freedoms. What they burn down is the first amendment rights of attorneys. **Dombrowski v. Pfister** 380 U.S. 479, 491, n.7, 14 L. Ed. 2d.22, 85 S. Ct. 1116 (1965) Unconstitutionality for over breadth applies when the statute reaches a substantial amount of conduct, where it penalizes conduct that every person would regard as lawful, and where it punishes without a clear and present danger justifying the infringement on the first amendment right to freedom of speech. **Massachusetts v. Oakes** 105 L. Ed.2d. 493 (1990).

"The First Amendment doctrine of substantial over breadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally over broad as to others. **Board of Airport Commr's of Los Angeles v. Jews for Jesus** 482 U.S. 569, 574, 96 L. Ed. 2d. 500, 107 S. Ct. 2568 (1987); **Brockett v. Spokane Arcades, Inc**. 472 U.S. 491, 503-504, 86 L.Ed.2d. 394, 105 S. Ct. 2794 (1985). See generally Monaghan, Overbreadth, 1981 S.Ct. Rev. 1. The doctrine is predicated on the danger that an overly broad statute, if left in place, may cause persons whose expression is constitutionally protected to refrain from exercising their rights for fear of criminal sanctions. **Schaumburg v. Citizens for a Better Environment** 444 U.S. 620, 634, 63 L. Ed. 2d. 73, 100 S. Ct. 826 (1980). Over breadth doctrine has wide-ranging effects, for a statute found to be substantially over

broad is subject to facial invalidation." **Massachusetts, supra**, p. 500.

The act of moral turpitude statute and lack of candor standards are so broad that they violate the over breadth doctrine and are unconstitutional on their face as they have no core. They sweeps unnecessarily broadly so as to quash the freedom of speech of attorneys.

The United States Supreme Court has made clear that the term "moral turpitude" is limited to actual cases of intentional and knowing fraud. It does not include reckless statements. **Jordan v. De George** 341 U.S. 223; 71 S. Ct. 703; 95 L. Ed 886 (1951). This United States Supreme Court decision was by a 5 to 4 vote in 1951. It is probable that the United States Supreme Court, since the American Bar Association has declared the term "act of moral turpitude" too vague to be enforceable as a rule of professional conduct for attorneys that the reasoning of the dissent in **Jordan,** at 235 must be applied to declare the California statute prohibiting an act of moral turpitude unconstitutional for over breadth and vagueness. Justice Jackson stated, at **Jordan,** at 235, as follows:

> "Congress did not see fit to state what meaning it attributes to the phrase 'crime involving moral turpitude.' It is not one which has settled significance from being words of art in the profession. If we go to the dictionaries, the last resort of the baffled judge, we learn little except that the expression is redundant, for

> turpitude alone means moral wickedness or depravity and moral turpitude seems to mean little more than morally immoral. The Government confesses that it is `a term that is not clearly defined,' and says: `The various definitions of moral turpitude provide no exact test by which we can classify the specific offenses here involved...Black's Law Dictionary defines turpitude as: `Inherent baseness or vileness of principle or action; shameful wickedness; depravity.'..... Bouvier's Law Dictionary, Rawles Third Revision, defines `moral turpitude' as `An act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man.' Except for the Court's opinion, there appears to be universal recognition that we have here an undefined and undefinable standard.".

Levy pointed out how Courts may be confused between the vagueness and over breadth doctrines, which are different and distinct constitutional principles, when it stated that, "The result of the Court of Appeals' conclusion that Levy had standing to challenge the vagueness of these articles as they might be hypothetically applied to the conduct of others, even though he was squarely within their prohibitions, may stem from a blending of the doctrine of vagueness with the doctrine of overbreadth,..."

Statutes and rules, which apply to speech, are tested under stricter tests than statutes, which do not

apply to speech. This requires that the act of moral turpitude statute an lack of candor standard be tested by the strict compelling state interest test and narrow specificity requirements of the over breadth doctrine which requires no inquiry into whether the conduct of the accused clearly falls within the language of the statute as the statute is attacking everyone's speech. **Gooding v. Wilson**, 405 U.S. 518, 520; 92 S. Ct. 1103; 31 L.Ed. 2d 408 (1972). As held by the United States Supreme Court, "We apply ...[th[is] over breadth doctrine]... quite rigorously when a statute is directed at "pure speech," especially to its expressive content.. **Broadrick v. Oklahoma** 413 U.S. 601, 615; 93 S. Ct. 2908; 37 L. Ed. 2d 830 (1973); **Parker v. Levy** 417 U.S. 733, 760; 94 S.Ct. 2547; 41 L.Ed. 2d 439 (1974)

Due to the facial over breadth of the terms "act of moral turpitude," the attorney is entitled to an order exonerating him of those charges due to the inherent unconstitutionality of the terms.

Conclusion

The Petition should be entertained to enforce the decisions of the United States Supreme Court concerning the due process and equal protection requirements of notice set forth in the United States Constitution. These requirements are applicable to this quasi-criminal attorney disciplinary proceeding. They were admittedly violated. There were eight unnoticed charges, a change in the one moral

turpitude charge, no burden of proof or of evidence applied, a lack of evidence to support the findings, a refusal to rule on the constitutional lack of notice issues and to consider the unconstitutionality fo the moral turpitude statute applied to this protected speech.

Dismissal of this proceeding is the only remedy the United States Supreme Court has sanctioned for these admitted constitutional violations.

As such, the petition should be granted.

RESPECTFULLY SUBMITTED,

Dated:December 7, 2001 _____

JUSTIN DAHLZ,
Petitioner Attorney ***Pro Se***

THE STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL COUNSEL
ENFORCEMENT
FRANCIS C. BASSIOS
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THE STATE BAR COURT
OF THE STATE BAR OF CALIFORNIA
HEARING DEPARTMENT-SAN FRANCISCO

In the Matter of	) Case No. 96-0-03184-EEB
	)
JUSTIN R. DAHLZ	) FIRST AMENDED
No. 139783	) NOTICE OF
	) DISCIPLINARY
	) CHARGES
A Member of the State	)
Bar	)
	)

NOTICE-FAILURE TO RESPOND!

IF YOU FAIL TO FILE AN ANSWER TO THIS NOTICE WITHIN THE TIME ALLOWED BY STATE BAR RULES, INCLUDING EXTENSIONS, OR IF YOU FAIL TO APPEAR AT THE STATE BAR COURT TRIAL, (1) YOUR DEFAULT SHALL BE ENTERED, (2) YOU SHALL BE ENROLLED AS AN INACTIVE MEMBER OF

THE STATE BAR AND WILL NOT BE PERMITTED TO PRACTICE LAW UNLESS THE DEFAULT IS SET ASIDE ON MOTION TIMELY MADE UNDER THE RULES OF PROCEDURE OF THE STATE BAR, (3) YOU SHALL NOT BE PERMITTED TO PARTICIPATE FURTHER IN THESE PROCEEDINGS UNLESS YOUR DEFAULT IS SET ASIDE, AND (4) YOU SHALL BE SUBJECT TO ADDITIONAL DISCIPLINE.

STATE BAR RULES REQUIRE YOU TO FILE YOUR WRITTEN RESPONSE TO THIS NOTICE WITHIN TWENTY DAYS AFTER SERVICE.

The State Bar of California alleges:

Respondent, Justin R. Dahlz ("RESPONDENT'), was admitted to the practice of law in the State of California on June , 1989, was a member at all times pertinent to these charges, and is currently a member of the State Bar of California.

It is alleged that RESPONDENT willfully committed the following violations:

COUNT ONE
Case No. 96-0-03184
Rules of Professional Conduct, rule 3-110(A)
[Failure to perform legal services competently]

1. On or about November 22, 1989, RESPONDENT sent a letter to Michele Douglas (hereinafter "Douglas") to advise her

that her Worker's Compensation matter had been transferred to him for "processing" by the former law office of Richard-Rodriquez-Ivanhoe.

2. Along with this letter, RESPONDENT sent Douglas a Substitution of Attorney form and asked that she sign it and return the form to his office "right away."
3. Douglas signed the form on or about December 1, 1989, and thereby agreed to substitute RESPONDENT in place of Richard Rodriquez-Ivanhoe as her attorney of record in the matter of Michele Douglas v. Pacific Bell, Workers Compensation Appeals Board (hereinafter "WCAB"), Case Nos. OAK 165505 and OAK 126669.
4. RESPONDENT also contacted Rita McPeake (hereinafter "McPeake"), a Workers Compensation Hearing Representative for Pacific Bell, by telephone to advise her that he was representing Douglas.
5. Subsequent to becoming the attorney of record on behalf of Douglas, RESPONDENT filed no documents on behalf of his client in her WCAB matte and did nothing to resolve or advance her matter on the WCAB calendar.
6. On or about November 1, 1991, Fale Sala Leui, a Pacific Bell Claims Manager, sent RESPONDENT a letter informing him that Pacific Bell intended to file a petition to dismiss Douglas' case if he failed to respond

to the letter. A copy of this letter was also sent to Douglas and her former attorney.

7. RESPONDENT replied to this letter on or about November 29, 1991, and advised the Claims Manager that he had been in contact with his client. He further advised the Claims Manager that his client fully intended to pursue her WCAB claim and that he was in the process of accumulating data and would get back to the Claims Manager within a couple of weeks.
8. RESPONDENT thereafter failed to contact the Claims Manager, failed to accumulate any documents or data on behalf of his client's condition, ad failed to move forward on his client's case.
9. On or about September 26, 1993, Elaine Wazz, also a Pacific Bell Claims Manager, sent RESPONDENT a letter informing him that she noted from her file that RESPONDENT had taken no action on the Douglas matter for over a year. She also advised RESPONDENT that Pacific Bell intended to file a petition to dismiss Douglas' case for lack of prosecution if she did not hear from RESPONDENT within thirty (30) days. A copy of this letter was also sent to Douglas and her former attorney.
10. RESPONDENT did not respond to the September 26, 1993, letter and no further work was done by RESPONDENT to prosecute his client's case.

11. On or about January 25, 1996, RESPONDENT failed to appear at a WCAB hearing on behalf of his client. The Minutes of the hearing indicate that Douglas was presently unrepresented. Subsequent to this hearing, Douglas had no choice but to represent herself and to file all necessary court documents to prepare for trial. RESPONDENT remained, however, as the attorney of record for Douglas.
12. On or about March 14, 1996, RESPONDENT contacted McPeake and advised her that he did not intend to appear at a scheduled WCAB conference on March 28, 1996, in conjunction with Douglas' case.
13. By failing to prosecute his client's WCAB matter for a period of well over six (6) years and failing to appear at scheduled hearings on her behalf, RESPONDENT intentionally, recklessly and repeatedly failed to perform legal services with competence.

    By the foregoing conduct, Respondent willfully violated Rules of Professional Conduct, rule 3-110(a).

COUNT TWO

Case No. 96-0-03184

Business and Professions Code, section 6068(m)

[Failure to communicate with client]

1. Count one of the First Amended Notice of Disciplinary Charges is incorporated by reference as if set forth in full herein.
2. After signing the Substitution of Attorney form, which she sent back to RESPONDENT at his request, Douglas did not hear anything further from RESPONDENT until March 1996.
3. On or about September 8, 1990; October 8, 1990; November 8, 1990; January 8, 1991 and February 8, 1991, Douglas sent RESPONDENT a letter (with copies of the same letter following the initial one) asking that he advise her of the status of her WCAB case. RESPONDENT never responded to any of the letters sent on or about the indicated dates.
4. On or about April 8, 1990; April 28, 1990; May 3, 1990; May 22, 1990; May 30, 1990; June 15, 1990; June 26, 1990; July 7, 1990; July 20, 1990; and August 9, 1990, Douglas attempted to contact RESPONDENT to find out the status of her matter. She never spoke with RESPONDENT and left messages for him to return her calls.– RESPONDENT never returned any of Douglas' phone calls.
5. The only time Douglas heard from RESPONDENT after he substituted into her case was on or about March 7, 1996. At that time, RESPONDENT informed Douglas that he no longer wanted to be bothered with her case.

6. By not responding to letters or phone calls from his client concerning the status of her WCAB case from in or about April 1990 to in or about February 1991, and by failing to otherwise communicate with his client until March, 1996, RESPONDENT failed to respond promptly to the reasonable status inquiries of his client.

By the foregoing conduct, Respondent willfully violated Business and Professions Code, section 6068(m).

COUNT THREE

Case No. 96-0-03184

Rules of Professional Conduct, rule 3-400(D)(1)

[Failure to Release client file promptly]

1. Counts one and two of the First Amended Notice of Disciplinary Charges are incorporated by reference as if set forth in full herein.
2. After RESPONDENT advised Douglas that he no longer wanted to be bothered with her case, Douglas wrote to RESPONDENT to request the return of her file. RESPONDENT failed to thereafter return and\or make available Douglas' file.
3. RESPONDENT thereby failed promptly to release to his client, at her request, all client papers in his possession.

By the foregoing conduct, Respondent willfully violated Rules of Professional Conduct, rule 3-700 (D)(1).

COUNT FOUR

Case No. 96-0-03184

Rules of Professional Conduct, rules 3-700 (a)(1) and 3-700 (a) (2)

[Improper withdrawal from employment without permission]

1. Counts One through Three of the First Amended Notice of Disciplinary Charges are incorporated by reference as if set forth in full herein.
2. By failing to take any action on behalf of Douglas in her WCAB matter and by ultimately advising Douglas during the March 7, 1996 phone conversation that he no longer wanted to be bothered with her case, RESPONDENT withdrew from his representation of Douglas.
3. Following the March 7, 1996 phone conversation with RESPONDENT, Douglas requested that RESPONDENT file with the WCAB a Substitution of Attorney form. RESPONDENT failed to do so. RESPONDENT also failed to apply to the WCAB for permission to withdraw from the Douglas case. He continued to be the attorney of record until the case was settled by Douglas herself.
4. By advising Douglas that he would no longer handle her case and thereafter failing to file a Substitution of Attorney or failing to request permission to withdraw as the attorney of record,

RESPONDENT withdrew from employment in a proceeding before a tribunal without its permission.
5. In addition, by failing to perform any legal services after being substituted into her matter by Douglas and failing to communicate same to his client, RESPONDENT effectively withdrew from employment without taking reasonable steps to avoid reasonably foreseeable prejudice to Douglas' rights in her WCAB matter.

By the foregoing conduct, Respondent willfully violated Rules of Professional Conduct, rules 3-700 (A)(1) and 3-700 (A)(2).

COUNT FIVE
Case No. 96-0-03184
[Commission of acts involving moral turpitude, dishonesty or corruption]

1. Counts One and Two of the First Amended Notice of Disciplinary Charges are incorporated by reference as if set forth in full herein.
2. In addition to advising McPeake on or about March 14, 1996 that he did not intend to appear at a scheduled WCAB conference on March 28, 1996 on behalf of his client, RESPONDENT also informed McPeake that his client did ot wish to pursue his client the WCAB matter.
3. In fact, RESPONDENT had not spoken with his client and it was Douglas' desire to continue to prosecute her case.
4. By advising McPeake that his client did not want to pursue her WCAB matter, RESPONDENT

intentionally misrepresented the position of his client and committed an act of dishonesty.

By the foregoing conduct, Respondent willfully violated Business and Professions Code, section 6106.

COUNT SIX

Case No. 96-0-03184

Business and Professions Code, section 6152(A)

Rules of Professional Conduct, rule 1-400 (c)

[Solicitation]

1. Count one of the First Amended Notice of Disciplinary Charges is imcorporated by reference as if set forth in full herein.

2. At the time RESPONDENT sent Douglas the letter stating that her Workers' Compensation matter had been transferred to him for "processing," RESPONDENT had no family or prior professional relationship with her. He thereby solicited employment by her to provide legal services.

By the foregoing conduct, Respondent willfully violated Business and Professions Code, section 6152 (a), and Rules of Professional Conduct, rule 4-100(C).

COUNT SEVEN

Case No. 96-0-03184

Business and Professions Code, section 6106

[Commission of Acts involving moral turpitude, dishonesty or corruption]

1. Counts One and Five of the First Amended Notice of Disciplinary Charges are incorporated by reference as if set forth in full herein.

2. By soliciting employment employment by Douglas, and then failing to represent her competently, to communicate with her or return her file, and by improperly withdrawing from representation, Respondent engaged in acts which involved moral turpitude. By the foregoing conduct, Respondent willfully violated Business and Professions Code, section 6106.

NOTICE-ENTRY OF DEFAULT

YOUR DEFAULT MAY BE ENTERED IF NO RESPONSE IS FILED WITH THE CLERK OF THE STATE BAR COURT WITHIN TEN DAYS (10) DAYS OF SERVICE OF A MOTION FOR ENTRY OF DEFAULT. IF YOUR DEFAULT IS ENTERED; (1) THE FACTUAL ALLEGATIONS SET FORTH IN THE NOTICE OF DISCIPLINARY CHARGES WILL BE DEEMED ADMITTED; (2) EVIDENCE THAT WOULD OTHERWISE BE INADMISSIBLE MAY BE USED AGAINST YO IN THIS PROCEEDINGS; AND (3) YOU WILL LOSE THE OPPORTUNITY TO PARTICIPATE FURTHER IN THEE PROCEEDINGS, INCLUDING PRESENTING EVIDENCE IN AGGRAVATION, UNLESS AND UNTIL YOUR DEFAULT IS SET ASIDE ON MOTION TIMELY MADE UNDER THE PRESCRIBED GROUNDS. SEE RULES 200 ET SEQ., RULES

OF PROCEDURE FOR STATE BAR COURT PROCEEDINGS.

IF YOUR DEFAULT IS ENTERED AND THE DISCIPLINE IMPOSED BY THE SUPREME COURT IN THIS PROCEEDING INCLUDES A PERIOD OF ACTUAL SUSPENSION, YOU WILL REMAIN SUSPENDED FROM THE PRACTICE OF LAW FOR AT LEAST THE PERIOD OF TIME SPECIFIED BY THE SUPREME COURT. IN ADDITION, THE ACTUAL SUSPENSION WILL CONTINUE UNTIL YOU HAVE REQUESTED, AND THE STATE BAR COURT HAS GRANTED, A MOTION FOR TERMINATION OF THE ACTUAL SUSPENSION,. AS A CONDITION OF TERMINATING THE ACTUAL SUSPENSION, THE STATE BAR COURT MAY PLACE YOU ON PROBATION AS THE STATE BAR COURT DEEMS APPROPRIATE. SEE RULE 205, RULES OF PROCEDURE FOR STATE BAR COURT PROCEEDINGS.

NOTICE-INACTIVE ENROLLMENT!

YOU ARE HEREBY FURTHER NOTIFIED THAT IF THE STATE BAR COURT FINDS, PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 6007 (c), THAT YOUR CONDUCT POSES A SUBSTANTIAL THREAT OF HARM TO THE INTERESTS OF YOUR CLIENTS OR TO THE PUBLIC, YOU MAY BE INVOLUNTARILY ENROLLED AS AN INACTIVE MEMBER OF

THE STATE BAR. YOUR INACTIVE ENROLLMENT WOULD BE IN ADDITION TO ANY DISCIPLINE RECOMMENDED BY THE COURT. SEE RULES 101(c), RULES OF PROCEDURE OF THE STATE BAR.

NOTICE-COST ASSESSMENT!

IN THE EVENT THESE PROCEDURES RESULT IN PUBLIC DISCIPLINE, YOU MAY BE SUBJECT TO THE PAYMENT OF COSTS INCURRED BY THE STATE BAR IN THE INVESTIGATION, HEARING AND REVIEW OF THIS MATTER PURSUANT TO BUSINESS AND PROFESSIONS CODE SECTION 6086.10. SEE RULE 280, RULES OF PROCEDURE OF THE STATE BAR.

Respectfully Submitted,

THE STATE BAR OF CALIFORNIA
OFFICE OF THE CHIEF TRIAL COUNSEL

Dated: December 22, 1999 BY:_____
CYDNEY BATCHELOR
Deputy Trial Counsel